

The IRS Political Activities Enforcement Program for Charities and Religious Organizations: Questions and Concerns

Nonprofit Speech Rights
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The Internal Revenue Service's new approach to enforcing the ban on partisan activities by charities and religious organizations has raised serious questions about the agency's interpretation of the law, about evenhanded enforcement, and about the appropriateness of an approach aimed at deterring speech.

This report summarizes the new program procedures and new compliance guidance from the IRS and raises questions that must be addressed to ensure charities and religious organizations can continue to play their essential role in public policy debates.

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executive summary

The Internal Revenue Service’s (IRS) new approach to enforcing the ban on partisan activities by charities and religious organizations has raised serious questions about the agency’s interpretation of the law, about evenhanded enforcement, and about the appropriateness of an approach aimed at deterring speech. The Political Activities Compliance Initiative (PACI), has resulted in unresolved audits and lingering questions about the standards used.

This report summarizes the new program procedures, new compliance guidance from the IRS and raises issues and questions that must be addressed to ensure charities and religious organizations can continue to play their essential role in public policy debates. There are two supplements to the report: one detailing the agency’s 2004 enforcement program, and one describing known cases that are currently or have been under investigation.

Questions and Issues About the IRS Political Activities Compliance Initiative

Vagueness of the Facts and Circumstances Test and the Reasonable Belief Standard

Charities, educational institutions, and religious organizations are among tax-exempt organizations described in Section 501(c)(3) of the Internal Revenue Code. They are prohibited from participating or intervening in any political campaign on behalf of, or in opposition to, any candidate for public office. But tax law lacks clear rules defining prohibited intervention in elections, instead considering the “facts and circumstances” of each case.

Is the Political Activities Compliance Initiative a Solution in Search of a Problem?

The answer is far from clear. IRS statements exaggerate the level of noncompliance by charities and religious organizations. The IRS claimed 74 percent of cases investigated involved violations, a figure based only on cases that were not dismissed after two rounds of investigation. A closer look at the IRS data reveals a very different picture. In all, no violation was found in 64 percent of all completed investigations.

Is the IRS Program Effective Enforcement or an Unconstitutional Infringement on Speech?

Several factors, when taken as a whole, raise constitutional concerns around the PACI program:

- *the vagueness of the “facts and circumstances” test*
- *secrecy regarding enforcement action*
- *IRS statements regarding its intent to prevent repeat violations before an election*

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- *the threat that an organization's tax-exempt status will be revoked*
- *lack of deadlines for closing cases*

Uneven Enforcement and Harassment Issues

A lack of transparency creates confusion and uncertainty about the enforcement process. Section 6103 of the tax code protects the privacy of individual charities and religious organizations. It also has prevented the IRS from adequately informing the public of the agency's interpretation of the law. Absent a bright line test, the most useful information for avoiding noncompliance comes from details of specific cases. So far what has come to light raises concern about unevenness in how the IRS treats similar fact situations.

Also, publicity around the PACI program could lead to a flood of retaliatory and harassment complaints in the 2006 election year, unless the IRS develops standards to screen out such abuses of its procedures.

Sanctions: Should the Law be Changed?

IRS staff has recommended changes in the law that would provide them with more enforcement options. But what sort of legislative modifications are anticipated? No specific proposals have been made public. Congress could devise a bright line test, add intermediate sanctions, such as advisory letters, to the IRS enforcement tool box, or both.

Conclusion and Recommendations

The IRS's new approach to enforcement could hamper nonpartisan issue advocacy and voter education and mobilization efforts. Our concerns derive mainly from the lack of a bright line rule defining what is partisan and what is not, coupled with "fast track" procedures.

Our review of the program has led us to conclude that:

- *The IRS should make clear that a charity's right to criticize elected officials is not suspended because an election is taking place.*
- *There is not widespread violation of the ban on intervention in elections.*
- *Concrete guidance, bright line rules defining partisan intervention, and/or safe harbors should be considered so that charities can know what is and is not allowed.*
- *The IRS must ensure that charities and religious organizations and IRS agents have clear, specific guidance to promote even-handed enforcement. It should develop complaint standards and investigate how other agencies deal with harassment situations.*
- *Nonprofits should consider what types of changes in the process, including sanctions, are best for the sector and be ready to respond if Congress acts.*

We hope the nonprofit sector and government officials, including the IRS and Congress, will engage in a thoughtful discussion of ways to overcome these challenges and take action accordingly.

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introduction

Since the 2004 election, the Internal Revenue Service (IRS) has stepped up its enforcement of the ban on partisan electoral activity by charities and religious organizations through a controversial new program. The result has been a number of unresolved audits and lingering questions about the standards used. This report intends to educate nonprofits about the new IRS procedures and call attention to the issues and problems they raise. There are two supplements to the report: one detailing the agency's 2004 enforcement procedures, and one describing known cases that are currently or have been under investigation.

On Feb. 24, 2006 the IRS released its assessment of the 2004 program to the public. The report found that a significant number of organizations investigated had violated the ban, but only three were serious enough to justify revocation of tax-exempt status. At the same time, the agency released guidance that includes detailed examples based on situations that led to investigations in 2004, and published new enforcement procedures for expedited handling of referrals alleging violations. According to the documents, the agency's goal is to deter any ongoing violations.

Charities, educational institutions, and religious organizations are among tax-exempt organizations described in Section 501(c)(3) of the Internal Revenue Code. They are prohibited from participating or intervening in any political campaign on behalf of, or in opposition to, any candidate for public office. Consequently, these organizations cannot endorse any candidates, make donations to their campaigns or become involved in any other activities that, directly or indirectly, may be beneficial or detrimental to any particular candidate. Even activities that encourage people to vote for or against a particular candidate on the basis of nonpartisan criteria violate the political campaign prohibition of Section 501(c)(3).

Tax law lacks a clear set of rules defining prohibited intervention in elections, instead considering the facts and circumstances of each case. Facts emerging from the 2004 audits indicate the IRS may be blurring the line between partisan intervention in elections and legitimate issue advocacy. This has a chilling effect on charities and religious organizations that want to express a point of view on current issues of interest to their constituencies. The 2006 enforcement procedures, called the Political Activities Compliance Initiative (PACI) fail to address this problem; their implementation in early 2006 has, in fact, raised additional questions.

It is important to enforce the current rules that prohibit charities from engaging in partisan electioneering. However, the implementation of the "facts and circumstances test" on an expedited basis has resulted in unresolved audits, unsubstantiated complaints, and ultimately, a chilling of charities' free speech.

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1. new enforcement procedures for 2006

The new Political Activities Compliance Initiative (PACI) procedures apply to the 2006 election season and beyond. According to IRS officials, its goal is deterrence, and action “while the issue remains prominent, so that there are no reoccurrences and so correction could occur prior to the relevant election.” The IRS also says it wants to educate charities and religious organizations and to give notice about the program.

The major change is the timing of investigations. The IRS will no longer wait for an annual return [Form 990] to be filed or the tax year to end before beginning an examination. However, no timeframe is given that spells out how long an IRS agent has to complete an investigation. The IRS refers to this as an “expedited” or “fast track” process.

The IRS will treat PACI cases “on a priority basis” by sending them to a Referral Committee, which will decide whether to proceed after reviewing the information. A majority vote (2 of the 3 members) will be needed to continue the investigation.

If an investigation proceeds, the Referral Committee will assign it to one of three categories:

- *Type A: single issue/non-complex, that the IRS expects to resolve through correspondence with the organization.*
- *Type B: multiple issue/complex, that involve more than one organization and/or issue and will require site visits by IRS examiners.*
- *Type C: egregious/repetitive: requires immediate action by IRS. Examples given for this category include widespread advertising supporting a candidate, political contributions that could drain a group’s treasury, or “clear and continuing support or opposition of a candidate.”*

Non-religious groups under investigation will be sent form letters and information document requests (IDRs) that will list details of the alleged misconduct and request an explanation. Copies of referral information from public sources will be enclosed, along with a notice from the IRS explaining the rules prohibiting intervention in elections. In Type C cases the initial contact letter will be sent within five days of receipt from the Classification Unit and give the organization seven days to respond.

Examinations of religious organizations are governed by special rules, as required by Section 7611 of the tax code. The Director of Exempt Organization Examinations must personally review the complete case file and approve what the IRS calls “church tax inquiry” and examination letters. As with non-religious organizations, IRS agents are given no deadline for completing their work.

A PACI case may be resolved by written advisory “if the taxpayer exhibits an understanding of the IRS’s position that a prohibited activity occurred, the violation was a one time, isolated, unintentional event, the organization corrected the violation (e.g. recovered funds), and the organization is not likely to violate the prohibition again.” The written advisory must include a warning and pertinent facts. The organization is not obligated to admit wrongdoing.

The procedures state that when an organization does not agree that a violation has occurred “depending on the nature of the violation, if it is clear the organization intends to continue the activity, revocation and/or excise tax under section 4955 should be considered.”

The plan includes internal procedures for the IRS to reclassify a case if, after further investigation, it uncovers facts that make the case fit another category. Information on PACI cases that are closed with advisory letters, assessed excise tax or have revocation proposed will be kept for five years to “ensure that previous violations are considered on current referrals.”

It stresses that prohibited intervention includes ‘any and all activities that favor or oppose one or more candidates for public office. The prohibition extends beyond candidate endorsements’.

2. new guidance

The new IRS Fact Sheet 2006-17 “is intended to help organizations understand what they can and cannot do when an election campaign is underway.” The guidance covers activities that brought on IRS scrutiny during the 2004 election, including voter mobilization, individual activities by leaders, voter guides, candidate appearances, issue advocacy, business activity, web sites and combined activities.

The guidance notes that the tax code’s prohibition on partisan activity by charities and religious groups (501(c)(3) organizations) applies to candidate elections at the local, state and national level. It stresses that prohibited intervention includes “any and all activities that favor or oppose one or more candidates for public office. The prohibition extends beyond candidate endorsements.” The IRS will use all facts and circumstances to determine whether political intervention has occurred.

Specific Activities

Voter Education, Voter Registration and Get Out the Vote Drives

These activities are permissible “if they are carried out in a nonpartisan manner.” Two examples illustrate extreme fact situations, but the circumstances of most permissible nonprofit voter mobilization will fall somewhere in between the examples.

Individual Activity of Organization Leaders

The IRS notes that high-level organizational officials can speak on important public policy matters, or on partisan electoral matters as individuals. It advises organization leaders to “clearly indicate that their comments are personal and not intended to represent the views of the organization.”

Candidate Appearances

The fact sheet notes that candidates can attend a group's events in many capacities, as a candidate, a public official, expert or member of the general public. The IRS warns that "the candidate may not be familiar with the organization's tax-exempt status and that the candidate may be focused on compliance with election laws that apply to the candidates' campaign rather than the federal tax law that applies to the organization." Therefore, organizations should make their own determination about how to handle candidate appearances. When a group invites a candidate, the IRS says it should:

1. *Provide all candidates seeking the same office an equal opportunity to appear, including consideration of the nature of the event and manner of presentation;*
2. *Not indicate support or opposition to any candidate, and explicitly state its neutral position when the candidate is introduced and when publicizing the event; and*
3. *Not allow any campaign fundraising during the event.*

Speaking or Participating as a Noncandidate

The IRS says when a candidate appears at events in some other capacity, such as officeholder or expert, or attends an event open to the public, the event is not automatically considered partisan.

IRS Fact Sheet 2006-17 provides many examples illustrating its guidance. For instance, it explains that permissible candidate forums can include separate appearances by candidates made at similar meetings where each has an equal opportunity to address questions on a wide variety of topics and the publicity had no comments on candidate qualifications. Where one candidate declines to appear, an organization must note that the order of candidate appearances is random and that the absent candidate declined to participate. The sole example of an impermissible forum involves a group asking just one candidate to appear.

Issue Advocacy vs. Political Campaign Intervention

Unclear distinctions between advocacy on issues, including criticism of public officials, and the endorsement or opposition of candidates became a controversial issue under the IRS's 2004 enforcement program. This section of the fact sheet states that "501(c)(3) organizations may take positions on public policy issues, including issues that divide candidates in an election for public office..." but "must avoid any issue advocacy that functions as political campaign intervention." Further, it notes that "[a] communication is particularly at risk of political campaign intervention when it makes reference to candidates or voting in a specific upcoming election." It then ambiguously adds that "[n]evertheless, the communication must still be considered in context before arriving at any conclusions."

The IRS explains that investigations will consider all facts and circumstances to determine whether issue advocacy or partisan electoral activity has taken

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place, including whether a communication:

- *Identifies one or more candidates;*
- *Expresses approval or disapproval of one or more candidates' position on an issue or an action taken;*
- *Is made close to the date of the election or refers to voting and the election;*
- *Raises an issue that distinguishes candidates;*
- *Is part of an ongoing series on the issue that are not timed to the election; and*
- *Is timed to influence a non-electoral event, such as a vote on specific legislation.*

Voter Guides

The guidance stresses that voter guides must not focus on a narrow range of issues or be structured to reflect bias. Key questions cited for determining if a voter guide violates the prohibition on campaign intervention are:

- *Are the questions and descriptions of issues clear and unbiased in both structure and content?*
- *Are the questions in the guide the same as the ones sent to the candidates?*
- *Do candidates have a reasonable amount of time to respond and explain his or her position in their own words?*
- *Are the candidates' answers unedited and published in close proximity to the questions?*
- *Are all candidates running for an office included?*
- *Do the questions cover most issues of interest to the electorate as a whole?*

“If the organization’s position on one or more issues is set out in the guide so that it can be compared to the candidates’ positions, the guide will constitute political campaign intervention”, according to the IRS. In addition, the IRS notes that distribution of biased voter guides prepared by other organizations can still amount to a violation of the ban on partisan activity.

Other

When a charity or religious organization sells or rents mailing lists or leases office space to candidates, or accepts paid political advertising, it must make these services available to all candidates and charge its usual rates. The IRS points out that statements on websites will be treated in the same way as in-print statements. It notes that links to candidate materials are not prohibited intervention if all candidates are represented or there is an exempt purpose served by offering the link. All facts and circumstances will be taken into account.

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3. legal and policy questions

The IRS's new approach to enforcing the ban on partisan activities by charities and religious organizations has raised serious questions about the agency's interpretation of the law, about evenhanded enforcement, and about the appropriateness of an approach aimed at deterring speech. While the program's stated intention is to address infractions before relevant elections, IRS investigations take time and are not necessarily completed before an election. In cases where no violation has occurred, this approach could result in silencing legitimate, constitutionally protected speech.

In the agency's report on its 2004 enforcement effort, the IRS acknowledged that the PACI procedures present "unique challenges," including:

- *"concerns regarding freedom of speech and religious expression";*
- *the fact that there is "no bright line test for evaluating political intervention";*
- *media reports on a small number of organizations that "create an impression of widespread noncompliance";*
- *the IRS's limited options for sanctions when violations occur;*
and
- *privacy laws that limit the IRS' ability to discuss enforcement action.*

(See **Supplement A: The 2004 Enforcement Program: Procedures and Results**)

We would add the potential chilling effect on advocacy and voter education and mobilization activities to this list. The new agency guidance, however, does not adequately address these "unique challenges." The chief problem may be the lack of a bright line test for charities and religious organizations to determine when their advocacy or voter mobilization work could be considered partisan electioneering. This problem compounds the negative impact of the other challenges cited by the IRS.

This section raises issues and questions that must be addressed to ensure charities and religious organizations can continue to play their essential role in public policy debates.

Is the Political Activities Compliance Initiative a Solution in Search of a Problem?

IRS statements regarding the results of its 2004 enforcement program give an exaggerated impression of the level of noncompliance by charities and religious organizations. The 2004 effort only dealt with 127 new referrals for investigation. Sixty-four cases were already pending, and 20 of those were leftover from the prior year. The total number of cases investigated in

2004 involve only 191 of the more than one million 501(c)(3) organizations recognized by the IRS.

The agency's report on the 2004 program claimed to have "found some level of prohibited political activity by section 501(c)(3) organizations in nearly three-quarters of the cases reviewed." However, this 74 percent figure was based only on cases that were not dismissed after two rounds of investigation.

A closer look at the IRS data reveals a very different picture. Overall, 59 of the 191 cases were dismissed immediately, leaving 132 to be forwarded to the field for further inquiry. At that stage another 22 were dismissed as not meriting further investigation. That left 110 for full investigation, just 61 percent of the original referrals.

The IRS has completed 82 of the remaining 110 examinations, finding that partisan activity occurred in 58 of them. That means that, to date, violations were found in only 30.3 percent of all referred cases, and 35.5 percent of completed investigations, including dismissed cases. Only three, just over 1 percent, of these were serious enough to warrant revocation of tax-exempt status. In all, no violation was found in 64 percent of completed investigations.

At the time of the report's and new procedures' release, IRS Commissioner Mark Everson told the City Club of Cleveland that more enforcement was needed, citing "a dramatic increase in the amount of money financing politics." He asked the audience, "Are we going to let these political activities spread to our charities and churches?" He then made a call to action "before it is too late."

Everson's claims mix apples and oranges, by referring to the increase in contributions and expenditures by 527 organizations, which are recognized political action committees, to justify stepped-up enforcement against 501(c)(3) organizations. Confusion about categories of tax-exempt organizations and the different rules that apply to them already abounds. This kind of statement only worsens that confusion.

Research data demonstrates that charities and religious organizations are well aware of the prohibition on partisan electioneering. In 1999, Tufts University, OMB Watch, and the Center for Lobbying in the Public Interest launched a research project to investigate the public policy role of charitable organizations. The project's findings were based on a national survey of a random sample of 1,738 tax-exempt public charities, the survey respondents' IRS Form 990, interviews, and focus groups.

The survey found that 87 percent of charities are aware that they cannot endorse candidates for office. In fact, many have an overly restrictive understanding of the tax rules with 43 percent believing they could not sponsor a candidate debate or forum. According to these findings, charities and religious organizations understand the rule, and if anything, are overly cautious. Although the IRS found a misperception among some nonprofit and church

2004 IRS Political Activities Compliance Cases

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|--------------------------------|-----|
| Total cases referred to IRS | 191 |
| Cases dismissed immediately | -59 |
| Cases referred to field agents | 132 |
| Further dismissals | -22 |
| Cases to be fully investigated | 110 |
| Cases still pending | -28 |
| Completed full investigations | 82 |
| Further dismissals | -24 |
| Total cases with violations | 58 |

leaders that they only have to avoid open endorsements of candidates, most know better.

The known cases (which are summarized in **Supplement B: IRS Political Activity Investigations: Publicly Disclosed Cases**) demonstrate that some groups are, in fact, testing the limits of what is allowed. Their actions, however, do not amount to widespread noncompliance that justifies expedited action that may silence perfectly legal communications and voter education by charities and religious organizations.

Conclusion: There is not widespread violation of the ban on intervention in elections. The IRS should provide greater clarity in future statements on this issue.

Is the IRS Program Effective Enforcement or an Unconstitutional Infringement on Speech?

The IRS has made clear in several statements that the purpose of its enforcement program is to deter repeat violations of the ban on partisan intervention in elections. While this sounds like good law enforcement policy, in light of a number of factors, PACI procedures raise significant First Amendment issues. In addition, the expedited procedures are inconsistent with the Internal Revenue Code and IRS regulations, according to the NAACP, which is currently challenging them.

Several factors, when taken as a whole, raise constitutional concerns around the PACI program:

- *The vagueness of the “facts and circumstances” test used by the IRS to determine what constitutes prohibited partisan activity. The lack of clear rules makes it difficult for charities and religious organizations to know how the IRS will view any particular communication or activity, and the IRS has extremely broad discretion in applying the test.*
- *Secrecy regarding enforcement action. Because Section 6103 of the tax code prohibits the IRS from disclosing information about its investigations, the exact facts and circumstances the agency believes constitute partisan electioneering remain a mystery.*
- *IRS statements regarding its intent to prevent repeat violations before an election imply an expectation that organizations notified of pending investigations cease the activities in question, even though no determination of wrongdoing has been made.*
- *The threat that an organization’s tax-exempt status is more likely to be revoked if it continues the activities in question while the IRS investigation is pending.*
- *Lack of deadlines for closing cases once a group has been contacted by the IRS. Long investigations that remain open in subsequent election cycles leave organizations unsure about how the IRS may view current activities. Cases involving the NAACP*

In nearly two-thirds - 64 percent - of the political activities enforcement cases from 2004, the IRS determined that no illegal intervention had taken place, and many of the discovered violations were minor.

From these circumstances, an important question for 2006 arises: should charities and religious organization have to cease legitimate activities while the IRS investigation is pending, despite no clear IRS definition of what is considered partisan?

and the California-based All Saints Church are among 22 still open from 2004.

In nearly two-thirds - 64 percent - of the political activities enforcement cases from 2004, it was determined that no illegal intervention had taken place, and many of the discovered violations were minor. From these circumstances, an important question for 2006 arises: should charities and religious organization have to cease legitimate activities while the IRS investigation is pending, despite no clear IRS definition of what is considered partisan?

The totality of factors surrounding the PACI program may well add up to a system that allows censorship through intimidation. Although the IRS has not explicitly forbidden groups it investigates from continuing the activities under scrutiny it has been clear that continuing the activity increases the risk of revocation of tax-exempt status.

The Supreme Court has held that “Any system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity.” (See *Bantam Books v. Sullivan* 372 U.S. 58 (1963)). The court has dealt with this issue in the context of news publications, control of obscene material and regulation of meetings and parades. In the cases involving media, the high court noted that the fact that a bad actor may abuse the system does not justify prior restraint. The same principle should apply to IRS enforcement of the ban on partisan electoral activity by 501(c)(3) organizations. Cases involving parades and meetings upheld permit systems, under which the decision-maker had clear limits on his or her discretion. Under the PACI program, the IRS has extremely broad discretion in applying the facts and circumstances test and no timeframe for when it must act, further contributing to the program’s prior restraint problem.

...groups that disagreed with the IRS finding of partisan intervention in the 2004 election may have felt pressure to admit wrongdoing...

Concerns have also been raised that groups that disagreed with the IRS finding of partisan intervention in the 2004 election may have felt pressure to admit wrongdoing, in order to get advisory letters rather than risk revocation of their tax-exempt status. IRS action in the All Saints case suggests this has happened. In that case, the IRS told church officials, if they admitted wrongdoing and agreed not to allow sermons critical of public officials during future election seasons, the IRS would not pursue the case further. All Saints rejected the offer, and its case is still pending.

Have other groups felt forced to accept advisory letters and cease activities, rather than run the risk of losing their tax-exempt status? There are no appeal rights at this stage of an investigation. A group that wishes to challenge the IRS adverse finding must either wait and contest revocation of exempt status, or pay an excise tax and seek a refund in order to force the case to court, as the NAACP has done.

The agency’s 2006 procedures acknowledge that, in some cases, a group being examined will not agree that a violation occurred. According to those procedures, “In these situations, depending on the nature of the violation, if it is clear the organization intends to continue the activity, revocation and/or excise tax under section 4955 should be considered.”

The new expedited process is not specifically authorized by the tax code or IRS regulations. The NAACP argues that the IRS must wait until a group files its annual Form 990 before taking adverse action. In cases of flagrant violations, the IRS already has the power to invoke Section 6852 of the Internal Revenue Code, which gives the agency the authority to seek an injunction, ordering the 501(c)(3) organizations to cease the activity immediately. This process, while forcing a charity or religious organization into court, at least provides it with some form of due process and a guarantee of impartiality. Under the PACI program, on the other hand, the IRS becomes prosecutor, judge, and jury.

Conclusion: In order to avoid a chilling effect on legitimate activity, the Political Activities Compliance Initiative should include clear timelines for completion of investigations and due process rights for organizations under scrutiny. The “fast track” process should be reconsidered.

Vagueness of the Facts and Circumstances Test and the Reasonable Belief Standard

IRS Fact Sheet 2006-17 states “all section 501(c)(3) organizations are absolutely prohibited from directly or indirectly participating in, or intervening in, any political campaign on behalf of (or in opposition to) any candidate for elective public office.” The agency will use all facts and circumstances to determine whether political intervention has occurred. While rulings and fact sheets provide some guidance for nonprofits, in the end the IRS has a great deal of discretion in making determinations.

The IRS uses a “reasonable belief” standard to determine whether to proceed with an investigation, but the IRS has not defined this standard.

The problem of vagueness also is apparent in the first step in the investigation process. The IRS uses a “reasonable belief” standard to determine whether to proceed with an investigation, but the IRS has not defined this standard.

A complaint against the Pennsylvania Pastors Network (PPN), described in **Supplement B** to this report, illustrates the difficulty created for all concerned by the program’s lack of definition or clear criteria.

In that case, the network of religious groups sponsored an event aimed at getting out the vote for a ballot initiative, which is permissible as a lobbying activity. The public official they invited to speak, Sen. Rick Santorum, was also running for re-election and numerous references to the election were made. Was the event promoting Santorum, the ballot initiative, or both? How could PPN plan its event in a way that ensures it will not be subject to an IRS investigation? What factors will the IRS consider as it reviews the complaint filed against PPN?

Something more than a “smell test” is needed, especially with First Amendment rights involved. IRS Revenue Ruling 2004-06 indicates some of the factors the agency will use to distinguish issue advocacy from partisan electioneering. The IRS, however, has wide discretion in weighing these factors. In contrast, the IRS letter to the NAACP explained in plain language that the group was being investigated because “in a speech made by Chairman

Julian Bond, Mr. Bond condemned the administration policies of George W. Bush on education, the economy and the war in Iraq.”

Simple opposition to an elected official’s policies or positions has never previously been considered opposition to that official’s reelection. In the absence of clear standards defining what constitutes intervening in an election or what amounts to a “reasonable belief” that a violation has occurred, charities and religious organizations are left wondering whether the IRS has not unilaterally expanded the law and contracted their speech rights.

Conclusion: Concrete guidance, bright line rules defining partisan intervention, and/or safe harbors should be created.

Uneven Enforcement and Harassment Issues

The IRS report on its 2004 program was a rare, if incomplete, glimpse into the enforcement process. The report revealed more about the agency’s internal procedures than the criteria it used to judge what facts and circumstances led to the determination that partisan electioneering had occurred. Still, it was a start. We strongly encourage the IRS to continue to report on the types of activities it finds violate the law and provide greater detail. For example, redacted versions of advisory letters or notices of revocation of exempt status would give charities and religious organizations a clearer idea of what activities they should avoid.

The enforcement process’s lack of transparency creates confusion and uncertainty. While Section 6103 of the tax code protects the privacy of individual charities and religious organizations, it also has prevented the IRS from adequately informing the public of the agency’s interpretation of the law. Absent a bright line test, the most useful information for avoiding noncompliance comes from details of specific cases.

Currently, we only know the facts of specific cases presented in the public statements of groups filing complaints and those willing to disclose that they have received notice that they will be examined. We learn of these cases mainly through the media. So far what has come to light raises concern about unevenness in how the IRS treats similar fact situations.

For example the IRS launched its investigation of All Saints Episcopal, based on a 2004 sermon that criticized both candidates for president and the war in Iraq, causing Americans United for Separation of Church and State to question the IRS’s impartiality. Executive Director Rev. Barry Lynn told reporters that, while he could understand why the IRS might question the All Saints sermon, he could not understand “why the tax agency did not take the same view about an even more partisan sermon by a Baptist pastor in Arkansas who preached on the successes of George Bush.”

The *Arkansas Democrat-Gazette* reported that the IRS had declined to pursue an investigation of the church, even though the sermon praised Bush and criticized Kerry.

Similarly, the slow pace of IRS action in the case of two Ohio churches, World Harvest and Fairfield Christian, is out of step with the 2006 PACI

procedures. The expedited procedures that apply in cases involving religious organizations outline seven steps that should take no more than 54 days. The complaint in this case was sent to the IRS on Jan. 17, 2006, so some action was expected by mid-March.

...serious questions about equitable application of the PACI program...need to be asked.

The IRS has yet to contact the two churches, leading many to wonder if no decision on whether to investigate has been made, because the IRS is behind on its PACI deadlines. If the IRS's silence on the case means a decision was made not to take action, serious questions about equitable application of the PACI program—in this case, whether a “reasonable belief” that a violation has occurred exists—need to be asked.

From these cases and others, the question arises: how can there be consistency in enforcement without defined standards? Are IRS employees being trained to look for facts that indicate a non-electoral purpose in an activity? What kinds of checklists are being used? Absent a bright line rule, at the least, a more formal process is in order.

The IRS's Fact Sheet 2002-10 explains how the agency treats complaints from third parties and what procedures they take to ensure “compliance programs are not improperly influenced by outside intervention.” All referrals, regardless of their source, are treated the same, according to the fact sheet. However, the procedures do not establish any criteria to filter out referrals that are intended to harass groups on the other side of an issue. Given the contentious nature of policy debates and political campaigns, complaints motivated by a desire to harass or weaken an opponent are likely to be numerous, and anecdotal evidences suggests this could be the case.

Publicity around the PACI program could lead to a flood of retaliatory and harassment complaints in the 2006 election year, unless the IRS develops standards to screen out such abuses of its procedures. Two complaints filed in early 2006 illustrate the potential for abuse inherent in the IRS's reliance on referrals from the public for leads in its enforcement programs.

On March 14, 2006, Citizens for Responsibility and Ethics in Washington (CREW) filed a complaint against Americans for Tax Reform (ATR) and Americans for Tax Reform Foundation (ATRF), alleging activities that “may violate IRS regulations and require a revocation of their tax-exempt status.” The following day, ATR filed a counter-complaint against CREW, alleging that CREW, a 501(c)(3) organization, engages in prohibited partisan activity because the majority of its ethics complaints have been filed against Republicans.

ATR also cites as evidence of partisanship, the facts that CREW Executive Director Melanie Sloan worked for Democratic members of Congress prior to joining CREW and that other CREW staff members have worked for liberal groups. If the IRS allows past employment or personal associations of staff to be considered in PACI investigations, it will open the door to highly questionable evidence and guilt by association. The IRS should not allow its limited enforcement resources to be wasted in this way.

Conclusion: The IRS should develop standards for complaints and investigate how other agencies deal with harassment situations. It should ensure that charities and religious organizations and IRS agents alike have clear, specific guidance that will promote evenhanded enforcement.

Sanctions: Should the Law be Changed?

The tax code spells out only two possible sanctions for violating the ban on partisan activity: revocation of exempt status and/or imposition of excise taxes on the organization and its managers. The written advisory letter process used by the IRS in its 2004 enforcement program is not specifically authorized. However, it serves a very useful purpose by addressing one-time or minor violations in a way that allows the organization to correct errors and continue its charitable or religious work.

The IRS evaluation of the 2004 program said the general approach in cases resolved through written advisories (warnings) should be re-evaluated in the future. “Additional measures may be needed if a significant number of these organizations are found to engage in political intervention in future years,” according to IRS staff. They now strongly recommend stricter enforcement, suggesting that “the IRS increase its use of revocation in cases that warrant this sanction,” raising a red flag for nonprofits.

While IRS officials and agents involved in the PACI program generally believe more guidance for both IRS agents and the public would be helpful, it has been suggested by some among them that “legislative modifications may be necessary to ensure our ability to effectively regulate in this area.”

What sort of legislative modifications are anticipated? No specific proposals have been made public. Congress could devise a bright line test, add intermediate sanctions, such as advisory letters, to the IRS enforcement tool box, or both.

Conclusion: Nonprofits should consider what types of changes are best for the sector and be ready to respond if Congress acts.

4. conclusion and recommendations

We fear the IRS's new approach to enforcement of the ban on partisan intervention in elections by charities and religious organizations could hamper nonpartisan issue advocacy and voter education and mobilization efforts. These concerns derive mainly from the lack of a bright line rule defining what is partisan and what is not, coupled with "fast track" procedures.

While Revenue Rulings and fact sheets provide general guidance, the day-to-day experiences of charities and religious organizations can be much more complex than anything covered in such documents. An organization may well find itself asking whether to speak out on pending legislation, a perfectly legal act, if an elected official that will vote on the bill is also running for reelection.

Our review of the program has led us to conclude that:

- *The IRS has taken an important and constructive step forward by publishing a report on its 2004 enforcement program and providing more guidance in its new fact sheet. The IRS should also make clear that a charity's right to criticize elected officials is not suspended because an election is taking place.*
- *There is not widespread violation of the ban on intervention in elections. The IRS should be more accurate about the facts in its future statements on this issue.*
- *Concrete guidance, bright line rules defining partisan intervention, and/or safe harbors should be considered.*
- *The IRS should develop standards for complaints and investigate how other agencies deal with harassment situations. It should ensure that charities and religious organizations and IRS agents alike have clear, specific guidance that will promote evenhanded enforcement.*
- *Nonprofits should consider what types of changes in the process, including sanctions, are best for the sector and be ready to respond if Congress acts.*

We hope that the nonprofit sector and government officials, including the IRS and Congress, will engage in a thoughtful discussion of ways to overcome these challenges and take action accordingly.

Supplement A: Results and Procedures of the 2004 Enforcement Program

Nonprofit Speech Rights
July 2006

The Internal Revenue Service's new approach to enforcing the ban on partisan activities by charities and religious organizations has raised serious questions about the agency's interpretation of the law, about evenhanded enforcement, and about the appropriateness of an approach aimed at deterring speech.

This is a supplement to the report *The IRS Political Activities Enforcement Program for Charities and Religious Organizations: Questions and Concerns* that details the agency's findings on its 2004 enforcement procedures.

Kay Guinane, director of Nonprofit Speech Rights, directed the research, writing, and production of this project. She was assisted by Jennifer Lowe-Davis. Anna Oman designed the report.

In 2004, the IRS created new procedures to review, and expedite enforcement of, allegations of improper partisan electoral activities by 501(c)(3) organizations. The 2004 program stirred controversy when the National Association for the Advancement of Colored People (NAACP) revealed that it was being investigated because its chairman, Julian Bond, criticized President George W. Bush's policies on the war in Iraq and other issues during a speech at its annual convention. The NAACP accused the IRS of having partisan motives, after the agency sent them notice in September 2004 that it would be audited. The group had been conducting get-out-the-vote activities at the time.

In response to these accusations, the IRS asked the Treasury Inspector General for Tax Administration (TIGTA) to investigate. The results of this investigation were revealed in February 2005, when TIGTA published its *Review of the Exempt Organizations Function Process for Reviewing Alleged Political Campaign Intervention by Tax Exempt Organizations*. It describes the process established in June 2004 to “fast track” referrals and prevent recurring violations by 501(c)(3) groups

Thirty-four of the random sample of 80 groups selected for examination by TIGTA were religious organizations, and slightly more pro-Republican groups than pro-Democratic groups were selected for further investigation, according to the TIGTA report. TIGTA found no indication that the cases it reviewed were handled inappropriately. However, the report did not address whether the IRS has the authority to “fast track” these cases absent a flagrant violation, nor did it identify the types of fact situations that lead to examinations.

In response to concerns expressed by nonprofits and members of Congress, the IRS published a report on the results of the program, but acknowledged that it intended to expand its enforcement effort in 2006.

IRS Report on 2004 Program: Procedures and Findings

The IRS evaluation of its 2004 program, titled *Final Report: Project 302 Political Activities Compliance Initiative*, describes the intent of the new approach to enforcement, the procedures themselves, and results of the investigations to date. The report also make recommendations for the 2006 election year enforcement program.

Prior to 2004, political intervention cases were not expedited. The regular enforcement process, described in the Internal Revenue Manual, allowed the IRS 60 days to evaluate referrals, and had no deadline for completing a case. However, because of the political tension surrounding the 2004 election, the IRS expected an increase in the number of referrals of potential violations. The IRS initiated the expedited process in June 2004, according to the report, because the agency wanted the program to serve as a deterrent.

Under the 2004 program, referrals were reviewed by three career civil servants knowledgeable in tax law. Each member reviewed the file independently and documented his or her recommendations. The cases were then

reviewed jointly, and two of the three committee members had to agree to refer a case for examination before any further action was taken. If one member dissented his or her view was included in the file. This process occurred weekly rather than the usual monthly review.

The standard for determining whether to proceed was whether a “reasonable belief” existed that a violation had occurred, although the report does not define “reasonable belief.”

Once a case was selected for further investigation, the next steps were to be made within 7-10 days instead of the normal 30-90 days.

In 2004 there were 191 PACI cases, divided into three categories:

- *already being investigated (44 cases);*
- *pending evaluation in Jul. 2004 and received through Nov. 30, 2004 (127 cases), 68 of these were selected for examination; and*
- *pending from the prior year. (20 cases).*

The procedures and timetable for processing cases depended on their level of seriousness and complexity. Type A cases were “non-complex, usually single issue cases” and Type B cases were “more complex, multiple-issue cases.” The method used to process cases varied depending on the type of 501(c)(3) organization in question and the facts of the case. Section 7611 of the tax code requires a closer examination of religious organizations prior to making contact, unlike non-religious groups.

There were 191 cases in the 2004 program. Of these, 132 were forwarded to the field for further investigation. IRS field agents then dismissed 22 more cases, resulting in 110 total examinations for the PACI program. These included 40 Type A cases (33% of total) and 34 Type B (31% of total). Thirty-six pre-existing cases accounted for 33% of the total.

The IRS has completed 82 of the 110 examinations, finding partisan activity occurred in 58 of reviewed cases. Of these only three warranted revocation of tax-exempt status. In the remaining 55 cases the IRS issued written advisories and, for one organization, an excise tax. Appeals are pending in four of the 82 closed cases.

Table 1: 2004 IRS Political Intervention Program Examinations

(110 Total Examinations)

| | Religious Groups | Percent | Non-Religious Groups | Percent | Total Examinations | Percent Total 110 |
|--------------|------------------|---------|----------------------|---------|--------------------|-------------------|
| Type A | 29 | 72% | 11 | 28% | 40 | 36% |
| Type B | 5 | 15% | 29 | 85% | 34 | 31% |
| Pre-existing | 13 | 36% | 23 | 64% | 36 | 33% |
| Total | 47 | 43% | 63 | 57% | 110 | 100% |

Table 2: 2004 IRS Political Intervention Program Closed Cases

(82 Total Completed Examinations)

| | Religious Groups | Percent | Non-Religious Groups | Percent | Total Examinations |
|--------------|------------------|---------|----------------------|---------|--------------------|
| Type A | 26 | 79% | 7 | 21% | 33 |
| Type B | 3 | 14% | 19 | 86% | 22 |
| Pre-existing | 11 | 41% | 16 | 59% | 27 |
| Total | 40 | 49% | 42 | 51% | 82 |

The most common fact situations that led to findings that groups had crossed the line into partisan activity were:

1. *Distribution of printed materials that encourage members to vote for a candidate (24 alleged, 9 determined);*
2. *Endorsements from the pulpit (19 alleged, 12 determined);*
3. *Support for a candidate on the organization's website (15 alleged, 7 determined);*
4. *Distribution of partisan voter guides or candidate ratings (14 alleged, 4 determined);*
5. *Campaign signs displayed (12 alleged, 9 determined);*
6. *Preferential treatment given some candidates to speak at events (11 alleged, 9 determined); and*
7. *Cash contributions to a political campaign (7 alleged, 5 determined).*

Table 3: Violations Found in IRS Political Activity Examinations by Activity Type

(58 Total Violations Found)

| Activity Type | Alleged | Violations | % Violations of Allegations |
|--|---------|------------|-----------------------------|
| Preferential treatment given some candidates to speak at events | 11 | 9 | 82% |
| Campaign signs displayed | 12 | 9 | 75% |
| Cash contributions to a political campaign | 7 | 5 | 71% |
| Endorsements from the pulpit | 19 | 12 | 63% |
| Support for a candidate on the organization's website | 15 | 7 | 47% |
| Distribution of printed materials that encourage members to vote for a candidate | 24 | 9 | 37% |
| Distribution of partisan voter guides or candidate ratings | 14 | 4 | 29% |

The results show that distribution of printed materials and voter guides are the least proven problem areas for enforcement. In contrast, preferential treatment of candidate speakers at events has the highest rate of violations, indicating a need for clearer guidance in this area. The next two most frequent types of violation- displaying campaign signs and making cash contributions to campaigns- involve concrete actions that can be easily proved or disproved, with little or no need for the IRS to use its discretion in applying the “facts and circumstances” test. However, these two activities combined only account for 19 of the overall allegations, and 14 of the overall violations. This means that, in the vast majority of cases, the IRS uses a subjective test to determine whether violations have occurred.

The results of the 2004 examinations point to the need for better guidance and/or clearer rules, especially given the severity of possible penalties. However, in 2004 the IRS did not seek revocation of tax-exempt status in most cases. Instead, the IRS issued written advisories when the intervention was “of a one-time, non-recurring nature, or was taken in good faith on advice of counsel or was otherwise shown to be an anomaly,” and corrective measures were taken, including “steps to prevent any future political intervention.” In most cases excise tax was not an available sanction because there were no expenditures involved in the alleged transgression.

Supplement B: IRS Political Activity Investigations – Publicly Disclosed Cases

Nonprofit Speech Rights
July 2006

The Internal Revenue Service's new approach to enforcing the ban on partisan activities by charities and religious organizations has raised serious questions about the agency's interpretation of the law, about evenhanded enforcement, and about the appropriateness of an approach aimed at deterring speech.

This is a supplement to the report *The IRS Political Activities Enforcement Program for Charities and Religious Organizations: Questions and Concerns* that describes known cases that are currently or have been under investigation.

Kay Guinane, director of Nonprofit Speech Rights, directed the research, writing, and production of this project. She was assisted by Jennifer Lowe-Davis. Anna Oman designed the report.

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IRS investigations, audits, and resolutions are confidential, and the IRS cannot publicly comment on specific cases. Therefore, few details are known about the examinations in the Political Activities Compliance Initiative. Organizations under investigation or people that file complaints with the IRS, however, may and sometimes do publicly disclose information about their specific cases.

This supplement provides details of ten known cases gathered from news reports and complaints, sorted by the type of activity investigated. Taken together, these stories are the best available information about how the IRS is currently interpreting and applying the law.

Statements About Candidates

All Saints Episcopal Church (CA): In Nov. 2004, the IRS initiated an audit into anti-war remarks delivered during a church sermon two days before the 2004 general election.

On Oct. 31, 2004, the Rev. George F. Regas delivered a guest sermon at All Saints, beginning with the disclaimer, “I don’t intend to tell you how to vote” and noting that, “Good people of profound faith will be for both George Bush and John Kerry...” The sermon went on to envision what Jesus would say to both candidates about the issues of peace, poverty and the impact of poverty on abortion choices.

Regas closed his sermon by urging the congregants to “bring a sensitive conscience to the ballot box,” and “vote your deepest values.” The imagined statements of Jesus sharply criticized the war in Iraq, nuclear weapons and noted both candidates “failure and the failure of so many political leaders to help uplift those in poverty...”

On June 9, 2005, the IRS sent All Saints officials a letter notifying them that “a reasonable belief exists that you may not be tax-exempt as a church...” The letter cited a Nov. 1, 2004 Los Angeles Times story that characterized the sermon as a “searing indictment of the Bush administration’s policies in Iraq.” It requested information about church operations and notified church officials of their right to discuss the case with the IRS before the examination began. All Saints hired as counsel the former director of the IRS Exempt Organizations Division, Marcus Owens of Caplin and Drysdale.

A Sept. 22, 2005 conference call was held to allow IRS representatives, church officials and their counsel to discuss the allegations. In a follow-up letter to the IRS, Owens wrote that the IRS action was unsupported by the facts and threatened the church’s core values. Addressing the difference between issue advocacy and partisan electioneering, Owens wrote, “the church takes issue with your suggestion that the mere mention of candidates’ names, coupled with statements regarding the speaker’s personal values, is sufficient to constitute prohibited campaign intervention.”

The letter stated that the IRS told All Saints that the sermon may be an implicit intervention in the election, despite the fact that Regas explicitly

said he was not telling people how to vote and that criticism was directed at both candidates.

Following the call, the IRS offered a deal: if the church would admit wrongdoing and agree not to hold similar sermons in the future, the IRS would not pursue the case further. All Saints rejected the offer, with Rector J. Edwin Bacon explaining, “We have a responsibility to articulate our core values... The IRS is arguing implicit endorsement, and that’s a slippery slope that could do away with the freedom of speech and freedom of religion.”

Leaders in the faith community, from all points on the ideological spectrum, have spoken out against the IRS action. Ted Haggard, president of the conservative National Association of Evangelicals, told the *Los Angeles Times* that his group will work with other church organizations “in doing whatever it takes to get the IRS to stop.” Robert Edgar, general secretary of the National Council of Churches said the IRS action “appeared to be a political witch hunt on George Regas and progressive ideology. It’s got to stop.” A statement from Progressive Christians Uniting said the case “raises important questions about how much latitude IRS field offices have been given to initiate these cases based on murky criteria and no clear understanding of what does or does not constitute impermissible electioneering.”

In December 2005 publicity about the All Saints investigation prompted three members of Congress to call for an investigation by the Government Accountability Office. Rep. Adam Schiff (D-CA), whose district includes All Saints, was joined by Reps. Walter Jones (R-NC) and Joseph Pitts (R-PA) in making the request. To date the GAO has not begun any investigation.

The IRS informed the church in an October 2005 follow-up letter that the agency would be sending a document information request in the near future. Church officials have not heard from the IRS since that time, so All Saints wrote the IRS on March 29, 2006 inquiring as to whether the church was still under investigation.

Charles Street African Methodist Episcopal Church (MA): On April 4, 2004, the Rev. Gregory Groover of Charles Street African Methodist Episcopal Church introduced Sen. John Kerry from the pulpit during the Palm Sunday service as the “next president of the United States.” According to the *Washington Times*, Groover said, “We’re thankful that there’s going to be a revolution in this country ... a new movement...And we say, God, bring him on, the next president of the United States.”

A lawyer for Charles Street, Frederick E. Dashiell, said the complaint was dismissed after the Roxbury church told the IRS that the introduction was not intended as an endorsement. Dashiell called it “a bit intimidating” that the church would be investigated for what he called “an inadvertent statement.”

First Baptist Church of Springdale (AR): The IRS investigated a July 2004 complaint filed by Americans United for Separation of Church and State

In December 2005 publicity about the All Saints investigation prompted three members of Congress to call for an investigation by the Government Accountability Office... To date the GAO has not begun any investigation.

arising from a 4th of July sermon given by the Rev. Ronnie Floyd, in which the pastor endorsed President Bush for re-election. The complaint was reportedly dismissed.

In the sermon in question, Floyd outlined Bush's positions on such issues as "God-ordained" marriage and abortion, and described how faith in Christ helps Bush in government service. Floyd also outlined the positions of Bush's Democratic opponent, Sen. John Kerry of Massachusetts. He did not name the candidates but photographs of them appeared on screens as he described their political stances. He then encouraged church members to register and vote "the way we say we believe, by the authority of God's word, Christian values, convictions and beliefs. In other words, we must vote God."

An attorney for First Baptist, Matthew Staver, said Floyd never told anyone to vote for Bush, so he was never worried about the IRS complaint. Staver said the IRS asked a few questions last fall, to which the church responded.

He told the *Arkansas Democrat-Gazette*, however, that it was obvious who Floyd endorsed in the presidential election, referring to Bush. "If he stood at the pulpit and said nothing, you knew who he was going to vote for," Staver said. "You'd have to be an idiot not to know who he was going to vote for, because the positions the church takes on issues and the positions of the candidates."

Staver told the newspaper in July 2005 that First Baptist had not received written notice that the complaint was dismissed, but the church has been "advised verbally they don't have any desire to pursue this further."

Friendship Missionary Baptist Church (FL): On Feb. 15, 2005, the IRS notified Friendship Missionary Baptist Church that it was under investigation for engaging in partisan political activity. The investigation stemmed from an October 2004 appearance by Democratic presidential candidate Sen. John Kerry (D-MA) at a Sunday service.

In a 10-page letter to the church, the IRS wrote, "a reasonable belief exists that [the church] engaged in political activities that could jeopardize its tax-exempt status as a church." Included with the letter was a 21-question inquiry regarding the pastor's alleged endorsement of Kerry, coordination with the Kerry campaign, and solicitation of contributions.

The inquiry was prompted by an Oct. 13, 2004, request to the IRS by watchdog group Americans United for Separation of Church and State. The IRS, in its letter to Friendship Missionary, also cited an Americans United press release in the publication *Tax Analyst*.

The Rev. Gaston Smith informed his congregation of the inquiry. He stated that visits by political candidates are nothing new and the 75-year-old church did not violate the tax code. He noted that during the previous week, Miami-Dade mayoral candidates Jimmy Morales, a Democrat, and Carlos Alvarez, a Republican who was later elected, made campaign stops there.

According to Friendship Ministry, the service was nothing out of the ordinary. The service schedule consisted of praise and worship, followed by Smith's sermon and altar call. Kerry then spoke for approximately five minutes and was followed by the Rev. Jesse Jackson and the Rev. Al Sharpton.

However, a conflicting report by Americans United stated, "During the service, the church's pastor ... introduced Kerry as 'the next president of the United States' and told the crowd that 'to bring our country out of despair, despondency and disgust, God has John Kerry.'"

While Friendship Ministry declined to ponder the motivation of the IRS inquiry, Rep. Kendrick Meek (D-FL) charged that the complaint came from outsider groups that may be specifically targeting black churches. In a *Miami Herald* article, he stated that two other Miami-area churches received inquiry notices last year, but declined to name them or discuss the probes.

In late Dec. 2005 the IRS told Guy Lewis, attorney for Friendship Missionary Baptist Church, that the case would be closed and resolved favorably for the church. Before the investigation, the church had reduced its formal policy regarding candidate appearances to writing, which helped convince the IRS that there was no attempt to favor one candidate over another, and therefore, no political intervention.

Voter Mobilization

Pennsylvania Pastors Network (PA): On March 22, 2006 a complaint filed against the Pennsylvania Pastors Network (PPN) alleged a get-out-the-vote training it held improperly featured Sen. Rick Santorum (R-PA), without inviting his opponent. PPN, a coalition of four conservative organizations, sponsored get-out-the-vote training held March 6, 2006, in Valley Forge, PA. The network's mission is "to help educate the church regarding the key social and cultural issues of the day." Included in the training agenda were speakers on a variety of church issue advocacy efforts and Santorum, who is running in 2006 for re-election to the U.S. Senate. Bob Casey, his Democratic opponent, was not present or listed as an invited speaker.

Santorum spoke to the 125 participants in a seven-minute video presentation, urging pastors to be vocal on a proposed constitutional ban on same-sex marriage. PPN then gave out copies of Santorum's new book, *It Takes a Family*, which master of ceremonies Colin Hanna praised. One of the speakers, the Rev. Frank Pavone of Priests for Life, stressed that control of the Senate is important when Supreme Court vacancies occur, and "this particular president needs the kind of support that he has today but might not necessarily have after 2006." A few days later, PPN announced that it will hire 10 full-time organizers to help churches get out the vote this year.

PPN is comprised of two 501(c)(3) organizations (the Pennsylvania Family Institute and the Urban Family Council) and two 501(c)(4) organizations (Let Freedom Ring and the Pro-Life Federation). A 501(c)(4) group, unlike a 501(c)(3) group, can endorse candidates, but a joint effort that includes a 501(c)(3) organization must be nonpartisan. The situation is complicated,

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since work on ballot initiatives is considered lobbying and is permissible for 501(c)(3) organizations.

The training was recorded by a member of Americans United for Separation of Church and State, which gave the tape to the *New York Times*. On March 21, Americans United issued a statement, calling the training an “under-the-radar” drive to support Santorum. The following day, Citizens for Responsibility and Ethics in Washington (CREW) filed a complaint against PPN, asking the IRS for an investigation and saying PPN “may be engaged in prohibited electioneering by openly endorsing candidates for public office.” The complaint noted that the IRS 2004 compliance program found that nine organizations had violated the electioneering prohibit by giving “improperly preferential treatment to certain candidates by permitting them to speak at functions.”

World Harvest and Fairfield Christian Church (OH): On Jan. 16, 2006, 31 Ohio religious leaders filed a complaint with the IRS against two Ohio mega-churches and their affiliates, alleging a violation of the tax law’s prohibition on partisan electoral activity. The religious leaders alleged that the mega-churches have been carrying out activities intended to help Republican Secretary of State Kenneth Blackwell in his bid for Ohio’s governorship.

Lead by the Rev. Eric Williams of the North Congregational Church of Christ in Columbus, the pastor’s group sent a 13-page letter to IRS Commissioner Mark Everson, implicating World Harvest and its affiliates Reformation Ohio and the Center for Moral Clarity; and Fairfield Christian and its affiliate the Ohio Restoration Project. All five groups are 501(c)(3) organizations. The letter requested an IRS investigation into whether the groups’ tax-exempt status should be revoked; it also called on the IRS to seek an injunction to stop further flagrant violations. Three categories of activity were cited:

- *sponsoring events featuring Blackwell but no other candidates;*
- *partisan voter registration drives; and*
- *distribution of biased voter guides.*

The Revs. Rod Parsley of World Harvest and Russell Johnson of Fairfield Christian denied their actions were partisan, accusing the complaining pastors of an “unholy alliance” with the secular left. Williams countered, saying, “The law allows church involvement in issues. This goes beyond issue-involvement to partisan politics and we’re simply asking the IRS to uphold the law.”

The pastors filing the complaint acquired assistance from Marcus Owens, an attorney with Caplin and Drysdale in Washington, D.C. and a former director of the IRS-exempt organizations division. On Jan. 16, 2006, Owens told the *Columbus Dispatch* that the complaint was extensively documented, noting, “You have a number of churches and charities involved with a number of road trips for Mr. Blackwell, all of which seem to be aimed at gaining him visibility for his political campaign.”

The day after the complaint was filed the *Columbus Dispatch* reported that Blackwell told the pastors to ignore it, calling the 31 religious leaders who signed it “bullies.” The following day, Blackwell was the only candidate invited to speak to 450 pastors at a luncheon in Canton sponsored by the Ohio Restoration Project.

The day after the complaint was filed the Columbus Dispatch reported that Blackwell told the pastors to ignore it, calling the 31 religious leaders who signed it “bullies.”

The complaint cites nine events where Blackwell was a featured speaker but no other candidates were invited. (Democrat gubernatorial candidate Brain Flannery said he has never been invited to an event organized by the churches or their affiliates.) For example, at an October 2005 event at the Ohio statehouse sponsored by Reformation Ohio, Parsley shared the dais with Blackwell and called for registration of 400,000 new voters statewide.

In addition, Fairfield Christian let the Fairfield County Republican Party Central Committee meet at its facility without charge, with Committee Chair Carl Tatman saying, “The church was nice enough to volunteer the space as a donation.” A Republican fundraiser was held at the church a month later. The IRS requires 501(c)(3) organizations to charge market rates for political use of their space.

On Apr. 7, 2006 the 31 pastors again wrote a letter to the IRS citing further incidents of partisan activity and inquiring as to why no action had been taken. This time they were joined by an additional 25 pastors. As of April 7, 2006, the IRS had not yet contacted the organization about the complaint, according to *The New York Times*. The next day Rev. Parsley told the Canton Repository that his church had no plans for a radio campaign and would not be targeting conservative voters in their registration drive.

Issue Advocacy

National Association for the Advancement of Colored People (NAACP):

In October 2004, the NAACP announced that the IRS had launched an investigation into the organization’s tax-exempt status because Chairman Julian Bond criticized Bush administration policies in his speech to the group’s July convention.

The NAACP received a notice from the IRS on Oct. 8, 2004, saying that an examination of “whether or not your organization has intervened in a political campaign” was commencing. The IRS notice read: “We have received information that during your 2004 convention in Philadelphia, your organization distributed statements in opposition of George W. Bush for the office of presidency. Specifically in a speech made by Chairman Julian Bond, Mr. Bond condemned the administration policies of George W. Bush on education, the economy and the war in Iraq.” (It should be noted that charities have a constitutionally protected right to criticize administration policies.)

The IRS letter also noted a tax of 10 percent can be imposed on the group for “political” expenditures and a tax of 2.5 percent on any manager who agreed to it, a direct threat of personal sanctions for the NAACP’s 64 board members.

Immediately after the NAACP announcement of the IRS audit, several

members of Congress contacted IRS commissioner Mark Everson to remind him that charities have a right to “discuss or oppose various aspects of the Bush administration’s policies.” Rep. Charles Rangel (D-NY) went a step further and issued a statement saying, “This is a tactic of a police state if I’ve ever seen one.”

The same day, Senate Finance Committee ranking Democrat Max Baucus (D-MT) also wrote to Everson asking several questions, including whether the “political activity” limitation imposed on 501(c)(3) organizations had been broadened, what steps led to the decision to examine the NAACP, and if groups critical of Bush’s opponent have also been examined.

On Nov. 12, 2004, IRS Commissioner Mark Everson responded to the letter from Sen. Max Baucus. Everson’s letter said the IRS had not received any request to audit any group from the executive branch, but that two members of Congress requested “we look at one or more organizations in this area.” Everson wrote that those requests were treated the same as any other third party referral. The letter further denied political motivation, saying that “career employees determine whether specific information we review warrants further action.”

Everson went on to describe the IRS enforcement program to oversee the ban on partisan activities by charities, the first time the public was made aware of the program. Everson further noted changes in the law since the Nixon era to prohibit politically motivated audits. Any White House request for IRS action must be signed by the president and reported to Congress’s Joint Committee on Taxation (Internal Revenue Code Section 6103(g)). Executive branch employees and cabinet heads are prohibited from making such inquiries by Section 1105 of the IRS Restructuring and Reform Act of 1998.

The IRS issued an audit summons on Jan. 14, 2005, seeking information from the organization that is normally reported in its annual nonprofit IRS return, Form 990. On Jan. 27, 2005, the NAACP informed the IRS that it would decline to respond, maintaining that the IRS did not follow proper procedures and the agency’s actions are politically motivated. The IRS denied any political motivation and referred the allegation to the Treasury Department’s Inspector General for Tax Administration.

The NAACP responded that the summons was not issued for a legal reason because it was not yet due, noting, “It appears that political pressure, rather than any sound legal authority, motivated the Service to ignore the statutorily-mandated procedures for initiating an examination.” The letter noted the IRS can only take action prior to filing Form 990 if it meets the requirements of Section 6852 of the Internal Revenue Code, which gives the IRS authority to act on flagrant violations. The NAACP wrote, “While criticism of an administration’s policies might constitute intervention under some set of circumstances, it hardly rises to the level of a ‘gross violation’ or a ‘flagrant’ expenditure. Indeed, criticism or praise of government policy is First Amendment speech of a high order in a democratic society.”

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On Feb. 23, 2005, the IRS wrote to attorneys for the NAACP that the agency has legal authority to proceed and enforce the summons, setting a date for the NAACP to respond to the summons, and suggesting a March 2, 2005 meeting to discuss the case.

In a letter to the IRS following up on that meeting, Marcus Owens, of Caplin and Drysdale, attorney for the NAACP, stated the NAACP continued to object to the summons and declined to attend a March 11 meeting. The letter asked the IRS to close the case immediately and issue a letter stating the NAACP continues to be exempt under 501(c)(3) of the tax code. It noted that the IRS had already indicated the NAACP's exempt status is not likely to be at risk.

To force a resolution, the NAACP has paid what it estimates it would owe if the IRS found it had violated the ban on partisan activity. The excise tax rate is 10 percent of the cost of a prohibited communication. In this case the NAACP estimated it spent \$176.48 to disseminate Bond's speech, so it sent the IRS \$17.65. NAACP General Counsel Dennis Hayes said this in no way represents an admission of wrongdoing. Instead, the NAACP has filed for a refund of the \$17.65. If NAACP officials have not received the refund within six months, they will go to court for a review of their claim. The case will test the legality of the new IRS expedited enforcement approach.

Texans for Public Justice (TX): In 2003, Rep. Sam Johnson (R-TX), a member of the House Ways and Means Committee, which oversees the IRS, sent a letter to the agency requesting an investigation of Texans for Public Justice. The group, founded in 1997, tracks the influence of money on politics in Texas and publishes detailed reports on campaign spending and corporate lobbying. The group's 2003 report on illegal corporate spending in the 2002 reelection campaign of Rep. Tom DeLay (R-TX) led to a criminal indictment of DeLay.

The 2003 IRS examination of Texans for Public Justice, which included two auditors reviewing its books, found no violations. Founder Craig McDonald said the audit was "political retaliation by Tom DeLay's cronies to intimidate us for blowing the whistle on DeLay's abuses."

Published Endorsement

Falwell Ministries: Two complaints led to IRS investigations of Jerry Falwell Ministries, a 501(c)(3) organization, but both have been dismissed by the IRS.

The first complaint, filed by the Campaign Legal Center, claimed that an endorsement of President Bush appeared in the *Falwell Confidential* newsletter on the Falwell Ministries website during the 2004 campaign, violating both tax and election laws. The newsletter was also widely circulated in an email that included a solicitation of donations for and link to a conservative political action committee, the Campaign for Working Americans. Americans United against Separation of Church and State also filed a complaint with the IRS over the *Falwell Confidential* endorsement.

The complaint was dismissed because the communication was paid for by a 501(c)(4) organization, the Liberty Alliance and because Falwell was speaking as an individual and publisher and was thus legally entitled to express his views. The communications were made using corporate facilities, including the groups' shared website, which does not clearly distinguish between the 501(c)(3) and 501(c)(4) entities. It bears the name of the Jerry Falwell Ministries, the 501(c)(3), but in the About Us section says it is a project of the Liberty Alliance, the 501(c)(4). Matthew Staver, an attorney for Falwell, said Falwell should not lose his editorial free speech rights simply because he is also a preacher.

The second complaint, filed by Americans United for Separation of Church and State, alleged Falwell gave a speech at the Southwestern Baptist Theological Seminary in Aug. 2004 endorsing President George W. Bush. In dismissing the complaint, the IRS seems to have given latitude for speakers at organizational events in which they are expressing personal opinions.

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July 2006

The Internal Revenue Service's new approach to enforcing the ban on partisan activities by charities and religious organizations has raised serious questions about the agency's interpretation of the law, about evenhanded enforcement, and about the appropriateness of an approach aimed at deterring speech.

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Additional Resources

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Fact Sheet
<http://www.irs.gov/newsroom/article/0,,id=154712,00.html>

Charities, Churches, and Educational Organizations - Political Campaign Intervention
<http://www.irs.gov/charities/charitable/article/0,,id=155030,00.html>

Memo, Political Compliance Initiative Procedures
http://www.irs.gov/pub/irs-tege/paci_procedures-feb_22_2006.pdf.pdf

Report on IRS Review of Alleged Political Campaign Intervention
<http://www.irs.gov/charities/article/0,,id=135406,00.html>

Tax Talk Today
<http://www.taxtalktoday.tv/>

IRS Publication 1828, Tax Guide for Churches and Religious Organizations
<http://www.irs.gov/pub/irs-pdf/p1828.pdf>

NONPROFIT GROUPS

NPAAction.org
www.npaction.org

OMB Watch
www.ombwatch.org

Alliance for Justice
www.afj.org

Center for Lobbying in the Public Interest
www.clpi.org

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