



James Madison
JAMES MADISON CENTER FOR FREE SPEECH



Constitutional Protections for Pastors

Your freedom to speak Biblical truth on the moral issues of the day

September 2007

As the 2008 elections approach, various groups have launched intimidation tactics in an effort to silence churches and pastors about the great social and moral issues of our time. Churches and pastors need clear guidelines for permissible political activities to answer to these attacks. In response to that need, Alliance Defense Fund, The James Madison Center For Free Speech, Focus on the Family, Concerned Women for America, and Family Research Council are providing these guidelines¹ to ensure that pastors and churches are *not* silenced during this next campaign cycle. In addition, the Alliance Defense Fund and the James Madison Center are prepared to respond free of charge to inquiries by churches, pastors and priests on permissible political activities through informal e-mails, telephone advice and legal opinion letters.

Recently, we have seen groups like *Americans United for Separation of Church and State* send misleading letters to churches through its so-called "Project Fair Play" in an effort to muffle the voice of churches and pastors on critical social issues. Sometimes churches are even threatened with the loss of their tax-exempt status, and bogus complaints are filed with the Internal Revenue Service, occasionally leading to IRS investigations.² Thus, the remote possible loss of tax-exempt status is used by those hostile to people of faith to chill their right of free speech and to silence them in their own churches.

The groups that have resorted to scare tactics repeatedly speak out of both sides of their mouths. On the one hand, when people of faith speak out about moral issues *in public*, they are accused of attempting to force their religion upon others; but when they speak of moral issues *in church*, they are accused of engaging in politics. The Jeffersonian "wall of separation" doctrine has been twisted in an attempt to silence people of faith not only in the public square, but also in their churches. This attitude is an unofficial but outspoken bias against people of faith.

¹We encourage you to copy and share these guidelines with anyone who may benefit from their use.

²If you receive a notice from the IRS regarding a complaint or investigation, contact ADF immediately.

Such tactics are not new. They have been tried time and again, and have consistently failed. For example, in 1996, 1998 and 2000, pro-homosexual activists targeted churches that supported a proposition in California that defined marriage as being between one man and one woman. In one mailing, activists sent out some 80,000 threat letters. See Erik J. Ablin, *The Price of Not Rendering to Caesar: Restrictions on Church Participation in Political Campaigns*, 13 Notre Dame J. L. Ethics & Pub. Pol’y 541, 557 (1999). These would-be censors failed to suppress Christian speech—the California measure ultimately passed and no church had its tax-exempt status revoked. Churches and pastors must not allow these tactics of hate and intolerance to succeed in 2008.

By this letter, we assure you that churches and pastors have broad constitutional rights to express their views on a broad array of social issues such as marriage, abortion, and homosexual behavior. Furthermore, other activities such as allowing parishioners to sign petitions in support of traditional marriage are almost undoubtedly permissible under federal tax law. In the same way, the First Amendment to the United States Constitution most likely prevents states from demanding that churches register as “political committees” or report “contributions” when the churches merely preach about issues or allow petitions to be signed at their facilities.

If you are contacted by any government official or private activist group on such issues, please call either the Alliance Defense Fund or the James Madison Center immediately. Attorneys will promptly review your situation and make every effort to defend your church’s legal rights to speak freely in support of important social and moral issues. Below we briefly discuss the relevant law.

This concise overview summarizes the requirements of the Federal Election Campaign Act and the Internal Revenue Code as they apply to churches and pastors.³ As guidelines, they may not address every situation that you face and should not be construed as legal advice relevant to your specific set of facts. However, churches and pastors may obtain legal advice free of charge regarding your particular situation by contacting the Alliance Defense Fund at 1-800-TELLADF or www.telladf.org or the James Madison Center at (812) 232-2434 or www.jamesmadisoncenter.org.

IRS Tax Exempt Status of Churches

Almost all churches are exempt under section 501(c)(3) of the Internal Revenue Code on the basis that they are “***operated exclusively for religious, charitable . . .or educational purposes.***” As a 501(c)(3) exempt organization, a church:

- (1) is exempt from paying corporate income taxes;
- (2) donations to it are tax deductible on federal tax returns and;

³ One caution – state laws may be more restrictive than these guidelines and, therefore, in applying them to specific situations regarding state candidates or state elections, a local attorney should be consulted. ADF has more than 1000 allied attorneys across the United States to whom we may be able to refer you. Attorneys at the James Madison Center are also available for consultation.

(3) it may expend funds for religious, charitable and educational purposes and an insubstantial amount on lobbying and to promote legislation.⁴

A 501(c)(3) exempt organization, however, may not “participate in, or intervene in (including the publishing or distributing of statements) any political campaign on behalf of any candidate for public office.” Thus, a church may not participate in a political campaign on behalf of or against a candidate by expenditure of its funds or use of its facilities. Still, not all *political activity* that would influence an election falls under this prohibition.

Political Activities

Political activities referred to here are activities which influence the election of *candidates* for public office – most of which are referred to as “electioneering.” Activities which can influence the election of a political candidate are quite broad and range from contributions to a political candidate to activities such as publishing the voting record of incumbents who are also running for reelection. Only some of these activities are considered active electioneering which cannot be done by a church, *but many of these activities can be done by a 501(c)(3) organization or its pastors.*

“Active” electioneering cannot be done by a church. Active electioneering involves actions such as endorsements of candidates and expenditures of funds to expressly advocate the election or defeat of a particular candidate for political office. Active electioneering is of three types: (1) a direct contribution, which is a monetary contribution *given* to a candidate, (2) in-kind contributions, which include giving anything of value to a candidate (such as a church mailing list) or paying for a communication that expressly advocates the election or defeat of a clearly identified candidate made in coordination with a candidate, and (3) independent expenditures expressly advocating the election or defeat of a political candidate made *without* the knowledge of or consultation with any candidate.

Issue-oriented speech can also influence elections. Issue advocacy, however, may not be limited by government and may be freely engaged in by churches. Issue advocacy includes the discussion of issues of public concern, the actions of government officials in office and even the positions of candidates on issues. As long as one does not use explicit words expressly advocating the election or defeat of a clearly identified candidate, one is free to praise or criticize officials and candidates with regard to their positions on certain topics.

Pastors Have Separate Rights

Individuals, such as pastors or priests, may participate in political campaigns, as long as they do so as individuals, and not in the name of the church. Any individual, including a pastor, may wear different hats at different times and, therefore, be involved in political activity, as long as they *are wearing the right hat at the right time and place.*

Pastors and priests, as individuals, have the same rights as all other American citizens to

⁴ While the term “insubstantial” has not been precisely defined by the IRS, the general rule of thumb is less than 15% of the organization’s total activities or funds.

involve themselves in political activity. Pastors thus have much greater latitude to involve themselves in political activities than does a church. Individual pastors can endorse political candidates so long as the endorsement is not on behalf of the Church and it is not made in a way that gives the appearance that the endorsement is made in the capacity of pastor or priest.⁵

Pastors are understandably concerned about the legal effects of political activity on themselves and their churches, but should be aware that they are not required to remain silent and passive. Their voices and views can be exercised publicly so long as the basic guidelines are followed.

Summary

As we approach another election season, it is important that we make it clear that the would-be censors of political speech have sent a confusing, if not misleading message about what can rightfully be done. We have enclosed a chart of activities that may be considered political activities in the broad sense and have identified those activities which it is permissible for churches and pastors to participate.⁶ We hope this will guide you and encourage you to speak the Truth, to be an advocate for the godly principles and family values, and to be salt and light to this generation.

Sincerely,

Alliance Defense Fund

The James Madison Center For Free Speech

Focus on the Family

Concerned Women for America

Family Research Council

⁵ The pastor should refrain from declaring his personal support for a candidate while performing official duties (e.g. preaching, using church letterhead, etc.). When endorsing a candidate, the pastor may be identified as a pastor of a particular church for identification purposes only, and must indicate that the endorsement is solely that of the pastor and not the church.

⁶These guidelines summarize the general requirements of the Federal Election Campaign Act and the Internal Revenue Code only as they apply to churches and pastors. These guidelines should not be construed as legal advice regarding your particular situation. Churches and pastors may obtain legal advice, free of charge, regarding their particular situation from the Alliance Defense Fund or the James Madison Center.

Guidelines for Political Activities by Churches and Pastors

		Church	Pastor
(1)	Discuss the positions of political candidates on issues	Yes	Yes
(2)	Endorsement of political candidates	No	Yes
(3)	Financial contributions to political candidates	No	Yes
(4)	In-Kind contributions to political candidates	No	Yes
(5)	Independent expenditures in favor of or against political candidates	No	Yes
(6)	Contributions to political action committees (PACs)	No	Yes
(7)	Payment of expenses for attendance at a caucus or state/national political party convention	No	Yes
(8)	Appearance of political candidate at a church meeting or service	Yes	N/A
(9)	Non-partisan voter registration activities	Yes	Yes
(10)	Non-partisan voter identification activities	Yes	Yes
(11)	Non-partisan get- out- the- vote activities	Yes	Yes
(12)	Non-partisan voter education	Yes	Yes
(13)	Lobbying for legislation	Yes	Yes
(14)	Expenditures related to state referendums	Yes	Yes
(15)	Distribute:		
(a)	Candidate surveys or voter guides	Yes	Yes
(b)	Voting records of incumbents	Yes	Yes
(c)	Candidate campaign literature	No	Yes
(16)	Distribution by others of political statements in church parking lots	Yes	N/A
(17)	Rental of church lists to political candidates (at fair market value)	Yes	N/A
(18)	Church bulletin or newsletter:		
(a)	Political ads at regular rates	Yes	N/A
(b)	Political ads at less than regular rate	No	N/A
(c)	News stories	Yes	N/A
(d)	Editorials	No	N/A
(19)	Rent of church facility at same rate as other groups	Yes	N/A

Explanation of Individual Items

Item 1. Discuss the positions of candidates on public issues. Pastors and churches are free to discuss the positions of candidates on issues – including criticizing or praising them for their positions. This is called issue advocacy.

Item 2. Endorsement of political candidates. The endorsement of a candidate includes any statement which uses explicit words to expressly advocate the election or defeat of a clearly identified candidate, such as “elect,” “support,” “defeat,” or “oppose.” This is called express advocacy. Distributing campaign literature from a candidate is one form of express advocacy. A church may not engage in express advocacy.

However, a pastor may endorse a political candidate in their individual capacity. The pastors may state their affiliation with the church, as long as it is indicated that this is for identification purposes only and that their endorsement is from the pastor personally, not the church.

One controversial area is whether a pastor may personally endorse a political candidate from the pulpit. The IRS has taken the unequivocal position that this is not allowed. Some, however, believe that the First Amendment's provisions on free speech and free exercise of religion protect such statements. We believe that this is not a prudent step for pastors and do not recommend it.

Churches and pastors may support or oppose the appointment of judicial, cabinet or other non-elected officials. This is considered lobbying, not electioneering.

Item 6. Contributions to political action committees (PACs). A political action committee is any organization of two or more people whose major purpose is to engage in active electioneering by contributing to candidates or by expressly advocating the election or defeat of candidates for political office. Churches may not organize PACs and contributions to PACs from church funds are forbidden.

Item 8. Appearance of a candidate at a church meeting or service. A political candidate may appear at a church service under certain conditions. The appearance of a candidate before a church service is limited as follows:

- (1) All legally qualified candidates should be invited;
- (2) The questions should be prepared and presented by an independent, non-partisan panel;
- (3) The topics discussed should cover a broad range of issues of interest to the public;
- (4) Each candidate should have an equal opportunity to present his or her views on the issues discussed; and;
- (5) The moderator should not comment on the questions or otherwise make comments that imply approval or disapproval of the candidates.

Political candidates may be introduced at a church service or may preach or read scripture without any restrictions. In addition, public officials, who are also candidates, may be invited to speak to a church as a public official, without complying with the above requirements, if no reference is made to the public official's candidacy, if the public official speaks only in his/her capacity as a public official, and if there is no campaign activity in connection with the public official's appearance. A church may allow political candidates to use church facilities for meetings or campaign appearances on the same basis that other civic groups are allowed to do so. If other civic groups are required to pay some rent for using the church property, the political candidate should be charged the same amount.

Items 9, 10 and 11. Non-partisan voter registration, voter identification and get-out-the-vote activities. A church may participate in non-partisan voter registration, voter identification and get-out-the-vote activities. To be non-partisan, these activities may not be directed at the supporters of any particular candidate or political party. A church may, however, direct these activities at certain groups using non-partisan criteria, such as church membership, geographic location or position on certain issues. Furthermore, such activities will not be viewed as non-partisan if they are accompanied by literature praising or criticizing particular candidates or political parties for their positions on issues.

Item 12. Non-partisan voter education. A church may participate in non-partisan voter education. Here, voter education involves discussion of the electoral process, such as how to run for public office or delegate, how to register and where to vote. All these activities are permissible as long as they are not directed at supporters of one particular candidate or political party.

Item 13. Lobbying for legislation. Churches may spend an insubstantial amount of their funds yearly on lobbying. An insubstantial amount is generally considered 5 to 15 percent of a church's funds. Lobbying is of two types: (1) direct lobbying, which involves direct communications with governmental officials regarding legislative or executive action, and (2) grassroots lobbying, where the church communicates with its members or the general public urging them to contact governmental officials in support of or in opposition to legislative or executive action. As a result, a church may discuss legislative

issues, support or oppose legislation, encourage its members or the general public to support or oppose legislation and support other organizations with their lobbying efforts. Furthermore, churches may lobby candidates on their positions on issues and distribute educational material to candidates or at political events, as long as this is being done to get out the organization's message and not to assist any candidate.

Item 14. Expenditures related to state referendums. Churches may make expenditures in connection with state referendums, including making a financial or in-kind contribution to a referendum effort. Such expenditures are considered direct lobbying. In addition, state election laws should be consulted for any requirements imposed on state referendum activities.

Item 15 (a). Candidate surveys or voter guides. A church may publish the result of surveys of candidates on public issues (often called "voter guides"). Voter guides should not include an endorsement of a candidate or expressly advocate the election or defeat of any candidate. Further, voter guides should not include advocacy of voting for candidates who support particular issues, i.e., single issue voting. Churches may also distribute voter guides prepared by other organizations that meet these guidelines.

As a result, church questionnaires should conform to the following guidelines:

- (1) Questionnaires should be sent to all candidates;
- (2) The questions should cover a wide variety of issues;
- (3) The questions should not indicate a bias toward the church's preferred answer;
- (4) The candidate's responses should not be compared to the church's preferred position;
- (5) The responses should be published in the candidate's own words or in a neutral, unbiased and complete summary of the candidate's position; and;
- (6) The survey should not be published under the direction or control, direct or indirect, of any candidate.

Item 15 (b). Voting records of incumbents. Churches may also publish the voting records of incumbent public officeholders. In the case of publication of voting records, the church has more leeway than in publishing candidate surveys as follows:

- (1) Incumbent's positions should not be compared to the positions of other candidates or the church's position;
- (2) The voting record should be distributed on a regular basis, not just at election time;
- (3) The voting record should be broadly distributed to the general public, not targeted to certain voting blocks;
- (4) A variety of issues of interest to the general public should be presented.

Item 16. Distribution by others of political statements in church parking lots. Under many state constitutions, if a church parking lot is open for public use, people have a free speech right to distribute literature there. Even if there is no such right, a church is not responsible for political literature distributed by others in their parking lot without their permission or consent and a church has no obligation to bar people from distributing political literature there.

Item 17. Rental of church lists to political candidates (at fair market value). Lists of members of the church congregation may be rented to candidates for their use in seeking support or raising funds. The candidate must pay the fair market value for the list if it is rented from the church.

Item 18. Church bulletin or newsletter.

(a) & (b) Political ads at regular rates. A church bulletin or newsletter may publish an ad for a political candidate or political action committee, as long as the ad is purchased at the regular rate for such ads

published in that bulletin or newsletter. If discounts are given regular advertisers under certain circumstances, the same discounts may be extended to the political advertiser. A political ad may not be sold to a candidate at less than the regular rate since this would constitute a financial contribution to the candidate. Churches may accept paid political advertising provided the advertisement is identified as paid political advertising, the church expressly states that it does not endorse the candidate and advertising is solicited from all candidates on an equal basis.

Item 18. (c) News stories. A church bulletin or newsletter may publish news stories on political candidates and political campaigns. The publication of voting records and candidate surveys in bulletins are subject to the limitations delineated in Items 15 (a) and (b).

Item 18 (d) Editorials. A bulletin or newsletter, however, may not publish an editorial endorsing a candidate for political office.