

TESTIMONY: THE SHARING OF A CANDIDATE'S FAITH
JOURNEY IS NOT IMPERMISSIBLE CAMPAIGN
ACTIVITY

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I. INTRODUCTION

A. The General Synod of the United Church of Christ

Every two years the United Church of Christ (the “UCC” or the “church”), a Protestant religious denomination, holds a General Synod. Delegates from the church’s approximately 1.2 million members gather to conduct nationwide church business, worship, renew connections, and be inspired. It is a special time in the life of the church.

The General Synod held in Hartford, Connecticut in June of 2007 was very special. The UCC was celebrating its fiftieth anniversary, commemorating the merger of most of the churches belonging to the Congregational Church with those churches belonging to the Evangelical and Reformed Church to form the UCC.

This special occasion was celebrated in a special way. The church called upon prominent church members from a variety of fields to address the assembled on how faith informed their daily lives. Bill Moyers, noted journalist and Public Broadcasting System television host, and Lynn Redgrave, star of stage and screen, were just two of the church’s members who addressed the General Synod. Senator Barack Obama also addressed the General Synod. His speech to the UCC was entitled “A Politics of Conscience.”

B. Senator Obama

At that time, Senator Obama was a member of Chicago’s Trinity United Church of Christ, the largest predominantly African-American congregation and, indeed, one of the largest congregations in the UCC. In June of 2007, he also was one of the eight

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principal Presidential candidates for the Democrat nomination for President of the United States. By all measures, the UCC's General Synod was a success. More than 10,000 church members attended, making the twenty-sixth General Synod the largest in UCC history, and the largest convention ever to have been held in Hartford.

II. THE INTERNAL REVENUE SERVICE CHURCH TAX INQUIRIES

Senator Obama's appearance at his church's General Synod came under intense scrutiny.

Within the denomination, church members debated whether a candidate for public office should be invited to share her or his faith journey with fellow church members. Outside the denomination, the 2008 Presidential contest was becoming more defined by religious themes than any Presidential election since John F. Kennedy became the first Roman Catholic elected president in 1960. Indeed, for a number of election cycles, appearances by politicians at churches and the engagement of churches and clergy in the political process had steadily increased. So much so that the filing of complaints about these activities with the Internal Revenue Service (the "IRS") had become a political tactic. In an attempt to cut off your political opponent from religious audiences, you simply filed a complaint with the IRS and hoped to deter the number of churches willing to host the opponent and the number of clergy willing to speak on his or her behalf.

Whereas previous IRS focus often had been on the political engagement of more evangelical Christian ministries, the IRS was now flooded with an equal number of complaints about more progressive Christian faith communities. In a questionable display of evenhandedness, the IRS concluded that the Episcopal parish of All Saints Church in Pasadena, California had violated prohibitions on campaign activity when a former rector had delivered a sermon critical of the Iraq war on the eve of the 2004 Presidential election.²

2. The All Saints Church was issued a warning letter in 2005 from the IRS stating that because of the Rector's comments, it had concluded that "a reasonable belief exists that you may not be tax-exempt as a church . . ." See Patricia Ward Biederman & Jason Felch, *Antiwar Sermon Brings IRS Warning*, LOS ANGELES TIMES (Nov. 7, 2005), <http://www.commondreams.org/headlines05/1107-02.htm>. The church denied the allegation and refused the IRS' offer of settlement, which would have made the church promise to avoid similar speeches in the future and, instead, the church demanded an apology. See *Inconsistent Enforce-*

A. *The United Church of Christ Tax Inquiry*

Shortly after its General Synod closed, websites generally critical of the UCC reported that letters of complaint about Senator Obama's appearance had been filed with the IRS. On February 20, 2008, the IRS formally commenced a church tax inquiry regarding Senator Obama's appearance at his church's General Synod. The IRS letter to the denomination stated in part:

Because a reasonable belief exists that the United Church of Christ has engaged in political activities that would jeopardize its tax-exempt status as a church . . . this letter is notice of the beginning of a church tax inquiry . . . Our concerns are based on articles posted on several websites including the church's which state that United States Presidential candidate Senator Barack Obama addressed nearly 10,000 church members gathered at the United Church of Christ's biennial General Synod at the Hartford Civic Center on June 23, 2007. In addition, 40Obama volunteers staffed campaign tables outside the center to promote his campaign.³

III. THE LAW TAX EXEMPTION AND PROHIBITED POLITICAL ACTIVITIES

Since a 1954 amendment of the tax code initiated by then Senator Lyndon Baines Johnson, charities, educational, and religious organizations exempt under Section 501(c)(3) of the tax code cannot intervene in elections for candidates for public office and main-

ment: IRS Findings in NAACP and All Saints Church Cases, CTR. FOR EFFECTIVE GOV'T (Feb. 14, 2008), <http://www.foreffectivegov.org/node/3608> [hereinafter *Inconsistent Enforcement*]. Two years and three months after an investigation began and attorneys for both sides became involved, the IRS closed its investigation, "concluding that the sermon in question constituted intervention in the 2004 Presidential campaign" yet allowing the church to retain its tax-exempt status. *Id.* While there was no specific ruling by the IRS relating to this specific church and speech, the IRS in Rev. Ruling 07-41 (IRS Revenue Ruling 2007), set forth twenty-one situations describing when, and when not, among other things, non-profit organizations acted in contravention of their tax-exempt status by becoming involved in a political campaign. Included in Rev. Ruling 07-41, there is discussion, *see* Situation 13: Issue Advocacy vs. Political Campaign Intervention, wherein the IRS set forth factors that allowed it to conclude that the Rector's speech violated the rules used to maintain charitable tax exempt status. *Id.*

3. Letter from Marsha Ramirez, Dir. Of Exempt Org. Examination, Dep't of the Treasury, to United Church of Christ (Feb. 20, 2008) (on file with author).

tain tax-exempt status.⁴ The IRS uses “all the facts and circumstances of each case” to determine whether prohibited intervention has occurred.⁵ Partisan intervention can be either direct or indirect, and it is “not limited to the publication or distribution of written statements or the making of oral statements on behalf of or in opposition to candidates.”⁶ A candidate is defined as anyone “who offers himself, or is proposed by others, as a contestant for an elective public office, whether such office be national, state, or local.” 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.⁷

A. Section 7611

Given the constitutional implications - freedom of speech, freedom of association, and religious freedom - and in recognition that even a mere inquiry by the IRS imposes burden and expense upon a religious organization, Congress imposed what was intended to be a substantive hurdle before a tax inquiry can be instituted regarding a church’s political engagement. Section 7611 of the tax code requires that the IRS’s Director of Exempt Organizations Examinations must first determine that there is a reasonable basis to believe that the church may no longer be entitled to tax exempt status as a result of its political engagements.⁸

As stated in its February 2008 letter to the UCC, the IRS had concluded, “a reasonable belief exists that the United Church of Christ has engaged in political activities that could jeopardize its tax exempt status as a church.”⁹ But the IRS interprets the congressional safeguard to mean that it cannot communicate with the religious organization prior to making this prerequisite finding, and thus the IRS never spoke with the UCC before initiating its tax inquiry about Senator Obama’s appearance. Indeed, the IRS

4. *The Restriction of Political Campaign Intervention by Section 501(c)(3) Tax-Exempt Organizations*, IRS, [http://www.irs.gov/Charities-&-Non-Profits/Charitable-Organizations/The-Restriction-of-Political-Campaign-Intervention-by-Section-501\(c\)\(3\)-Tax-Exempt-Organizations](http://www.irs.gov/Charities-&-Non-Profits/Charitable-Organizations/The-Restriction-of-Political-Campaign-Intervention-by-Section-501(c)(3)-Tax-Exempt-Organizations) (last updated Mar. 18, 2013).

5. See *Inconsistent Enforcement*, *supra* note 2 (citing Rev. Rul. 07-41, 2007-25 I.R.B. 1421).

6. Rev. Rul. 07-41, 2007-25 I.R.B. 1421.

7. Letter from Marsha Ramirez, *supra* note 3.

8. See 26 U.S.C. §§. 7611(a)(1)(A), 7611(a)(2)(A).

9. Letter from Marsha Ramirez, *supra* note 3.

acknowledged that it based its conclusion solely on website coverage of the General Synod event.

The IRS's action was unprecedented. While the IRS had revoked the tax exempt status of Branch Ministries, also known as The Church of Pierce Creek, in 2000; Jimmy Swaggert Ministries in 1998; Pat Robertson's Christian Broadcast Network in 1986 and 1987; and Jerry Falwell's "Old Time Gospel Hour" in 1986 and 1987; *it had never before put the tax exempt status of an entire denomination in play*. The inquiry warranted and was given national media attention, and the attention of the UCC's ecumenical friends and partners. "There, but for the grace of God, go I," took on a new meaning for faith communities throughout the United States.

IV. THE UNITED CHURCH OF CHRIST'S RESPONSE

How did the UCC respond?

A. *UCC: History of Firsts*

The UCC is rightfully proud of its history; a history predominated with acts of social justice. The denomination traces its roots to Congregationalists and their Pilgrim and Puritan forbearers. An Evangelical and Reformed congregation in Pennsylvania hid the Liberty Bell from advancing British forces. Congregationalists formed the Amistad Committee and provided legal defense for the ship's African captives. The first denomination in the United States to ordain an African American, a woman, and an openly gay clergyman, the UCC is used to being on the frontier more than in the fortress. While the UCC did not choose to be the first denomination to undergo a church tax inquiry, it was prepared.

B. *The Legal Response*

In one sense, the UCC did not "respond" to the IRS. I was the Nationwide Special Counsel for the UCC and had been more than attentive to the governing law from the beginning. The inquiry gave the UCC the opportunity to so inform the IRS.

But in another sense, the UCC did respond. Confident of our legal position, the UCC early on made the decision that we would not treat this solely as a tax matter. The constitutional implications would not be ignored and we were prepared to press them, if need be.

The UCC was blessed. Every major law firm in Chicago and Washington, D.C. contacted about the case was eager to represent the church. We chose Seth Waxman, former Solicitor General of the United States, to make it clear from the outset how the UCC was prepared to handle the matter. Seth and his partners at Wilmer Hale made their confidence in our position and commitment to the issues clear by offering their services *pro bono*.

C. *The Facts*

The superficial basis for the IRS inquiry was reflected, in part, in twenty-three questions the IRS posed to the UCC as part of its inquiry: Questions such as “Please explain whether Senator Obama in fact spoke during the church’s General Synod on June 23, 2007, and the context,” betrayed the absence of even a rudimentary understanding of the relationship between Senator Obama and the church, and the events being called into question. Questions such as “Has the United Church of Christ been involved, either directly or indirectly, in any other activity that could be viewed as endorsing Senator Obama’s candidacy for U.S. President,” suggested that if the IRS could not find fault with the Senator’s General Synod appearance, it might be willing to fish for another catch.

Some questions appeared to stand the congressional caution of Section 7611 on its head, such as asking the UCC to provide its “rationale for engaging in the activity about which we have concern” rather than articulating on what basis the IRS had formed a reasonable belief that the UCC had violated federal law and asking for the church’s response.

1. The Invitation

In assessing the propriety of appearances by elected officials before tax-exempt organizations, the IRS distinguishes between candidate appearances and non-candidate appearances. When an elected official appears as a candidate for a particular office, the tax exempt organization is required to extend invitations and provide similar appearance opportunities to all other candidates for that office.¹⁰ When an elected official is not appearing as a candi-

10. See Rev. Rul. 07-41, 2007-25 I.R.B. (providing the following under the heading “Candidate Appearances”: “Whether the organization provides an equal opportunity to participate to political candidates seeking the same office;”

date, the inquiry properly focuses on some of the following considerations:

- Whether the individual is chosen to speak solely for reasons other than candidacy for public office;
- Whether the organization maintains a nonpartisan atmosphere on the premises or at the event where the candidate is present;
- Whether any campaign activity occurs in connection with the candidate's attendance;
- Whether the individual speaks only in a non-candidate capacity;
- Whether either the individual or any representative of the organization makes any mention of his or her candidacy or the election; and
- Whether the organization clearly indicates the capacity in which the candidate is appearing and does not mention the individual's political candidacy or the upcoming election in the communications announcing the candidate's attendance at the event.¹¹

Senator Obama was invited to speak at the UCC General Synod in May 2006, a full eight months before he announced his candidacy for President in Springfield, Illinois on February 10, 2007. The non-candidate capacity in which the Senator appeared at General Synod was in part established by this fact.

2. The Topic

Moreover, a May 9, 2007 letter from the UCC confirming that Senator Obama would be a speaker at the General Synod in June made clear the purpose of the presentation:

In your writing and public speaking you have been an articulate and thoughtful witness to the relationship of faith and public life. The delegates and visitors to our Synod will be eager to hear you

“whether candidates are an equal opportunity to participate, the nature of the event to which each candidate is invited . . .”).

11. See *id.* (“Candidate Appearances Where Speaking or Participating as a Non-Candidate.”).

reflect further on this important theme and to have you challenge us in our own public vocation on behalf of justice and peace in the world.¹²

3. The Introduction

Senator Obama was introduced at the General Synod in person by Rev. John H. Thomas, General Minister and President of the UCC, and via video by Rev. Jeremiah Wright. Rev. Wright was then Senior Minister of Senator Obama's church. No direct or indirect statements or comments in support of any candidate for public office were made by either Rev. Thomas or Rev. Wright during their introduction of Senator Obama. Neither Rev. Thomas nor Rev. Wright made any reference to Senator Obama's candidacy for President in their introductions.

4. The Admonition To The Faithful

The UCC's Associate General Minister, Edith Guffey, who spoke prior to Senator Obama's introduction and speech, stated to the assembled that Senator Obama was attending the event as a member of the UCC and to speak about the intersection of faith and public life. She emphasized that the audience should not attempt to engage in any political activities. Edith's admonition was videotaped:

We ask that you remember that we have invited Senator Obama to be with us to talk about the intersection of faith and public life. . . . Senator Obama is here today as a member of our church, and that is the context that we will welcome him and be excited to have him with us . . . Please do not bring in buttons, campaign signs, any of that - that really is not what we are about today.¹³

5. The Admonition To The Elected Official

Prior to the event, I sent an email to Joshua DuBois, the Director of Religious Affairs for Senator Obama, forwarding a copy of the governing Revenue Ruling, making Mr. Dubois aware of the

12. Letter from the United Church of Christ to Senator Barack Obama (May 9, 2007) (on file with author).

13. See J. Bennett Guess, *Obama's General Synod speech prompts IRS to investigate UCC's tax-exempt status*, UCC (Feb. 26, 2008), <http://www.ucc.org/news/obama-speech-in-2007-prompts-1.html>.

special rules that apply to tax exempt organizations like the UCC, and stating that the UCC wanted to model Senator Obama's appearance after a fact situation approved by the IRS in the Revenue Ruling.

6. Obama's Speech and The Campaign Workers

During his speech, Senator Obama briefly mentioned his candidacy. And the IRS raised concern about campaign workers outside the Hartford Civic Center venue (the "Civic Center").

If Senator Obama's reference to his candidacy during his speech represented a foot fault - a premise with which the UCC disagrees - such reference departed from the ground rules that the UCC conveyed to the Obama campaign and were not properly attributed to the UCC.

Moreover, the UCC did not authorize, or have any power to authorize, campaign volunteers for Senator Obama to set up tables near the entrances of the Civic Center. Space outside the Civic Center is public space, available to individuals within such constitutionally permissible restraints as may be imposed by the City of Hartford. The UCC had no control over such public space. The UCC did not know whether any permits were required or issued, and the UCC did not know if any of the campaign volunteers were members of the UCC.

Any enterprising candidate wanting to make a pitch to the 10,000 attendees at the General Synod could have done so outside the Civic Center. And at least one Presidential candidate beside Senator Obama did. Chris Dodd, Senator from Connecticut, had campaign posters displayed in office windows directly across from the Civic Center. While in June of 2007 I did not know if the IRS would commence a church tax inquiry into Senator Obama's appearance before the UCC, I did realize that if it did, documenting the Dodd campaign activities would be important. So when I saw those campaign signs, I bought a disposable camera and photographically recorded democratic politics in action. Nine months later, the prints were included in the UCC's submission to the IRS.

V. CONCLUSION

On May 13, 2008, the IRS issued its finding, "Based on your response to the inquiry, we have determined that the activity about which we had concern did not constitute an intervention or participation in a political campaign in violation of the require-

ments of Section 501(c)(3).¹⁴ There are legal lessons to be learned from this inquiry.

A. The Organization Is Only Responsible for Its Actions

Initially, the IRS has quietly acknowledged that an exempt organization does not have a responsibility to “ensure” that each of the benchmarks governing candidate appearances is present. Prior to June 2007, a Fact Sheet issued in February 2006 was the IRS’s most recent educational tool providing guidance to exempt organizations regarding political campaign intervention activities. In that Fact Sheet, the IRS had stated that the exempt organization “must ensure” that each of the evaluative factors was satisfied.¹⁵

In Revenue Ruling 2007-41, issued in June 2007, the IRS removed the “must ensure” language, while retaining the factors with slight reworking, notably including the addition of “whether” a factor was present in each case. This more workable and permissive approach recognizes that the overall facts and circumstances are to be taken into account, rather than applying a checklist of potential violations.

The IRS’s revised approach is more faithful to the language Congress used in Section 501(c)(3), which focuses on the organization’s actions, and it recognizes that some factors may simply not be within an organization’s full ability to control. In particular, an organization cannot “ensure” that a speaker, despite a request to the contrary, will not digress and make statements that may be viewed as promoting a candidacy. Moreover, Section 501(c)(3) is itself bounded by constitutional principles and must therefore be interpreted and applied by the IRS in a manner that respects a church’s substantial First Amendment interests in the conduct at issue. A novel application of Section 501(c)(3) that would penalize a church that undertook extensive efforts to avoid campaign intervention in inviting a church member to speak on important matters of faith and public life would run afoul of constitutional stric-

14. Letter from Marsha A. Ramirez, Dir. of Exempt Org. Examinations, Dep’t of the Treasury, to United Church of Christ (May 13, 2008) (on file with author).

15. See generally, *Election Year Activities and the Prohibition on Political Campaign Intervention for Section 501(c)(3) Organizations*, IRS (Feb. 2006), [http://www.irs.gov/uac/Election-Year-Activities-and-the-Prohibition-on-Political-Campaign-Intervention-for-Section-501\(c\)\(3\)-Organizations](http://www.irs.gov/uac/Election-Year-Activities-and-the-Prohibition-on-Political-Campaign-Intervention-for-Section-501(c)(3)-Organizations).

tures, chill protected activity and contravene longstanding traditions of our democracy.

B. Candidate Should Be Put on Notice by Their Tax Exempt Hosts

Secondly, for counsel advising clients, I cannot stress how important it was that the UCC communicated its expectations to the elected official and the audience before the appearance.

C. Congress Needs To Revisit Section 7611 and Make It a Meaningful Protection Against Overreaction

Finally, Section 7611, at least as currently interpreted by the IRS, is almost meaningless. It is difficult to discern how any finding of a possible federal law violation can be considered “reasonable” if it is not preceded by communication with the tax-exempt organization, at least to get basic facts and information, if not the organization’s perspective. In any event, when website information alone is deemed a sufficient basis for a “reasonableness” determination, one has to question whether the threshold Congress envisioned as a bar to needless burden, expense and chilling effect on constitutional rights is anything more than a modest speed-bump to a church tax inquiry. Congress needs to revisit Section 7611. Churches and other tax-exempt organizations need to prod it to do so.

D. Church Lessons

There are lessons for the faithful as well. Throughout its history, the UCC has not sought to disconnect faith from public life. It does not believe that tax-exempt status requires it to do so. Nor does it believe that seeking election to office, even the highest office in the land, precludes a believer from sharing her or his faith journey with the faithful. As in all things, the church must be the church. The church must pursue its mission with vigor. Faith has a place in the public square. And with God’s blessing, it always will.