

AN EDUCATIONAL UPDATE FROM
THE SOUTHEAST LAW INSTITUTE™, INC.

To: Interested Persons
Date: October 2017
From: A. Eric Johnston
Re: President Trump's Executive Order on Religious Freedom

President Donald Trump issued a May 4, 2017 Executive Order that purported to promote free speech and religious liberty. The essence of that order was to remove restrictions of the so-called "Johnson Amendment" which forbade churches from being involved in political activities. Then Congressman Lyndon Johnson had federal law amended in 1954, a result of a political spat. Nevertheless, the damage was done.

There is some confusion about whether or to what extent churches may engage in political activities, including candidate campaigns. The wisdom has been, by statute, that churches, as well as other religious nonprofit organizations, are totally precluded from participating in candidate campaigns and they are, by rule, not permitted to spend over 5% of their gross receipts on other political activities. The 5% rule was developed by the IRS and it has never actually been adjudicated. It has been the standard by which churches and religious organizations have operated.

Churches and religious organizations have submitted to the law due to the threat of revocation of tax exempt status by the IRS. That is a very real threat but, at least for churches, questionable. In recent years, Alliance Defending Freedom and others have invited churches to participate in political activities and have challenged the IRS to do something about it. Nothing has been done and the question remained unanswered. The Executive Order clears it up for now, but perhaps not permanently.

Churches enjoy a different status from other nonprofit organizations. There is a specific federal statute that recognizes the uniqueness of the church in America. 26 USC, § 508 (c)(1)(A) specifically provides that churches and their integrated auxiliaries, conventions or associations of churches are exempt from having to apply to the IRS for recognition of tax exempt status. In other words, the church is not required to bow the knee to the state for permission to operate as such.

All other nonprofit organizations, including religious, in order to have their contributions not taxable and deductible to the contributors, must apply as a type of Section 501(c) organization, usually under subsection (3). That section specifically provides that an exempt entity must comply with the requirements that

"no substantial part of the activities of which is carrying on propaganda, or otherwise attempting, to influence legislation (except as otherwise provided in subsection (h)), and which does not participate in, or intervene in (including the publishing or distributing of statements, any political campaign on behalf of (or in opposition to) any candidate for public office."

President Trump's Executive Order instructs the Internal Revenue Service, in effect, not to enforce this quoted language. Specifically, the IRS cannot penalize, including revoking the exempt status, of a nonprofit entity that engages in political activities in a substantial way or even participating in a candidate campaign.

This clearly protects those nonprofit entities. It also protects churches, even though churches are exempt from having to apply for recognition. Churches are usually lumped in with other religious nonprofit organizations when it comes to interpretation of these laws. Unfortunately, many churches erroneously apply for and receive 501(c)(3) status. As noted above, this is not required. It may put the church under more restriction than simply operating as a church without applying for government permission.

These distinctions may not make any difference under President Trump's Executive Order. We must keep in mind that his Executive Order can be changed. Although it is not likely he will change it during his time as President, there is that possibility, though remote, and certainly the likelihood that it will be done if Democrats regain the White House.

The only way churches and religious nonprofit organizations can adequately be protected is that the above quoted Code section be amended to remove the restriction. In the meantime, under the Executive Order, we believe there will be no restrictions on the expression of religious freedom by churches and religious nonprofit entities.

Finally, churches have been so indoctrinated in the idea of "separation of church and state" that understanding this situation may be difficult. Often, church members have differences of opinion about candidates. Therefore, it may not be too wise for churches to be involved in candidate campaigns.

On the other hand, churches have never been prohibited from being involved in issue campaigns, even encouraging voting in referenda. The 5% limitation applied then, but not now. These practices should continue, but without limitation. Churches and religious organizations should now be encouraged more than ever to participate on the issues in the public square. Scripture mandates the church be light and salt.