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# The IRS and Your Politically Controversial Speakers

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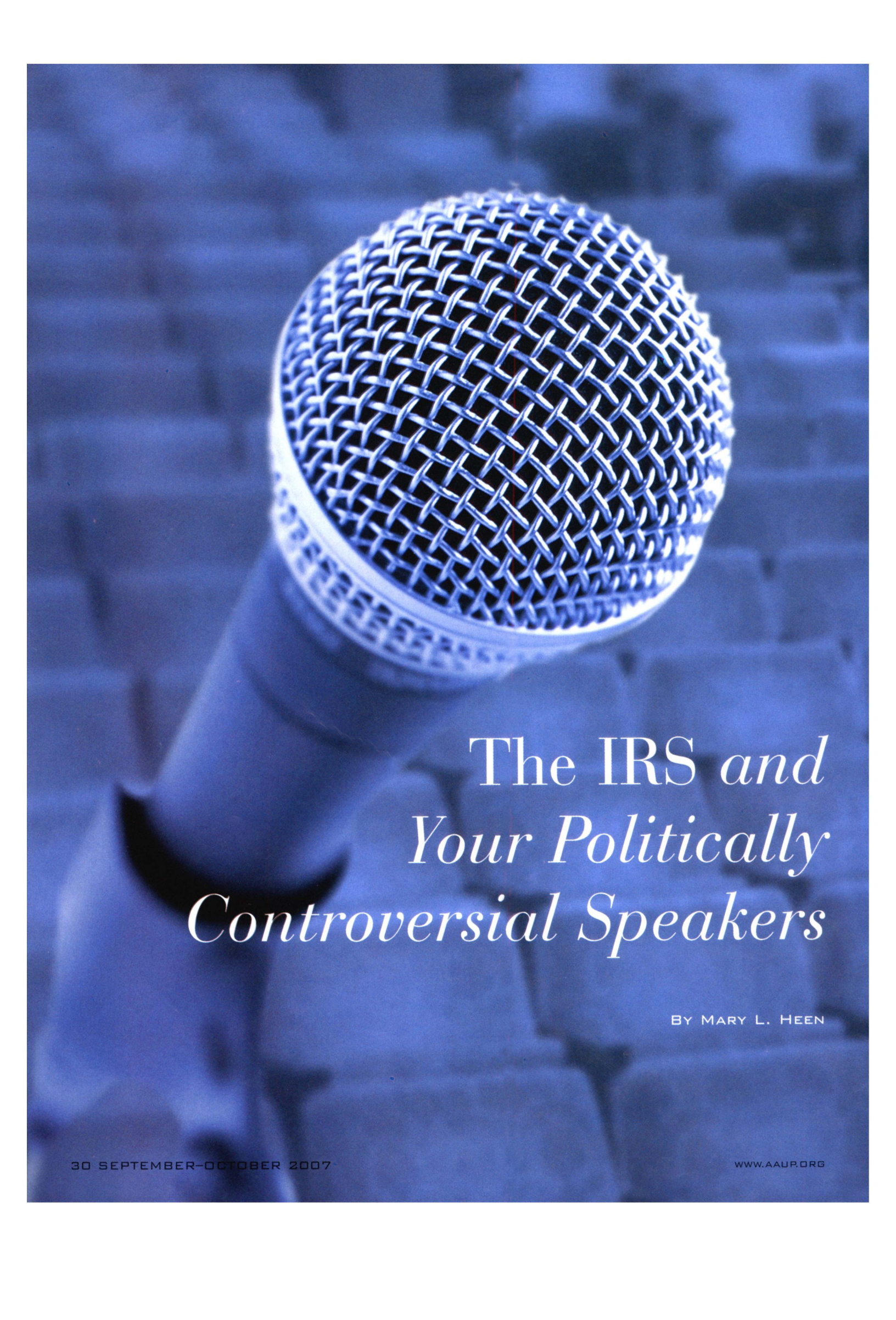
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*The IRS and  
Your Politically  
Controversial Speakers*

BY MARY L. HEEN

30 SEPTEMBER-OCTOBER 2007

[WWW.AAUP.ORG](http://WWW.AAUP.ORG)

*Don't be so cautious about who you invite to campus for fear of endangering your nonprofit status. You needn't shy away from politically controversial speakers.*

**D**uring the 2008 election cycle, we can expect an upsurge of incidents in which college and university administrators rescind legitimate invitations to politically controversial speakers. As *Academic Freedom and Outside Speakers*, a statement issued by the AAUP's Committee A on Academic Freedom and Tenure, affirms, "Because academic freedom requires the liberty to learn as well as to teach, colleges and universities should respect the prerogatives of campus organizations to select outside speakers they wish to hear." (The statement begins on page 62.)

In the past, administrators have sometimes cited the lack of balance represented by the invitation of a college or university group or the danger that a group's invitation might violate section 501(c)(3) of the Internal Revenue Code as reasons for canceling or modifying otherwise legitimate invitations. In *Academic Freedom and Outside Speakers*, Committee A expresses a concern that overly restrictive interpretations of section 501(c)(3) have become an excuse for preventing campus groups from inviting controversial speakers. Developments during the past two years reinforce that concern for the upcoming election season.

Increased enforcement efforts initiated by the federal government combined with the lack of clear rules in this area may lead college and university administrators to apply overly restrictive interpretations of the tax rules. Special danger is posed when administrators face strong objections by powerful constituencies offended by the views of an outside speaker.

Without a firm commitment to the academic freedom principles at stake, administrators may respond to public pressures or government compliance initiatives in ways that undermine the fundamental educational values of an open campus. *Academic Freedom and Outside Speakers* suggests several broad principles to

guide college and university communities in applying the tax rules to institutions of higher education.

#### **Academic Freedom at Stake**

Section 501(c)(3) provides that an organization may qualify for tax exemption only if it “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.” Under the regulations, activities constituting participation or intervention in a political campaign “include, but are not limited to, the publication or distribution of written

which operated a Christian church located in Binghamton, New York, purchased two newspaper ads four days before the 1992 presidential election. The ads contained an open letter signed by the church and its pastor, titled “Christians Beware,” which urged Christians not to vote for then-candidate Bill Clinton because of his position on moral issues. Fine print at the bottom of the ad invited “tax-deductible charitable contributions for this advertisement” along with the request that donations be made to the church. Alerted to the ads by newspaper reports and opinion columns, the IRS initiated an investigation and

democratic freedom should guide administrators in complying with the applicable federal tax rules without undermining fundamental educational values. First, the political prohibition of section 501(c)(3) should be interpreted in light of the educational mission of the college or university. Because the mission of colleges and universities includes creating and transmitting new knowledge, the university community’s right to hear ideas and to test them under standards of the academic profession goes to the heart of academic freedom. As part of their educational missions, many colleges and universities also seek to foster the development of mature independence of mind in their students by authorizing them to organize to invite outside speakers as a means of pursuing extracurricular interests. In so doing, institutions recognize and sustain an important element of academic freedom as a necessary condition for achievement of their educational objectives.

The IRS has recognized that activities that might otherwise constitute prohibited political activities can be understood, in the context of a college or university, as furthering the institution’s educational mission. For example, a course in political campaign methods that requires students to participate in political campaigns of candidates of their choice does not constitute participation in a political campaign by the university, according to a 1972 revenue ruling. Another ruling issued in 1972 established that providing office space, financial support, and a faculty adviser for a campus newspaper that publishes students’ editorial opinions on political matters does not constitute an attempt by the university to participate in political campaigns on behalf of candidates for public

### **BECAUSE THE MISSION OF COLLEGES AND UNIVERSITIES INCLUDES CREATING AND TRANSMITTING NEW KNOWLEDGE, THE UNIVERSITY COMMUNITY’S RIGHT TO HEAR IDEAS AND TO TEST THEM UNDER STANDARDS OF THE ACADEMIC PROFESSION GOES TO THE HEART OF ACADEMIC FREEDOM.**

or printed statements or the making of oral statements on behalf of or in opposition to such a candidate.”

Unlike lobbying, in which charities may engage as long as the lobbying activities are not substantial, the prohibition against intervention or participation in a political campaign (the “political prohibition”) is absolute. The consequences to an organization for violating the prohibition range from retroactive revocation of tax-exempt status to an excise tax on amounts spent on the prohibited intervention. In 1995, for the first time in its history, the Internal Revenue Service (IRS) revoked the tax-exempt status of a bona fide church because of its involvement in politics. Branch Ministries,

found an egregious violation of the political prohibition. In 2000, the United States Court of Appeals for the D.C. Circuit upheld the revocation by the IRS of Branch Ministries’ tax exemption under section 501(c)(3) retroactive to 1992, and rejected the argument of the church and its pastor that the revocation unconstitutionally violated their rights to free speech and to free exercise of their religion guaranteed by the First Amendment. The extreme range in severity of possible sanctions for prohibited activity, from loss of the organization’s charitable status to a minimal amount of tax due, poses both compliance and enforcement dilemmas.

In the college and university setting, three key principles of aca-

office. These types of activities instead have been viewed by the IRS as serving the university's tax-exempt educational purposes.

Second, consistent with the educational mission of colleges and universities, invitations by authorized faculty or student groups should be evaluated in light of the full range of the institution's curricular and extracurricular programming rather than on an invitation-by-invitation basis. As Committee A's statement points out, it would be a fundamental error to subject invitations to outside speakers within the context of teaching or research to a test of "balance" that does not reflect professional standards and expertise. However, most invitations do not involve pedagogical or scholarly judgment. Instead, they reflect the interests of campus groups that are authorized by colleges and universities to learn by pursuing their own extracurricular activities. It would be misguided in light of the educational role played by student organizations to require college Republicans or Democrats to "balance" their speaker invitations or programs with invitations to those representing opposing viewpoints. Instead, the spectrum of extracurricular activities sponsored by the college or university should be evaluated on the basis of its educational justifiability rather than on a standard of balance that does not reflect educational objectives.

Nevertheless, some administrators have reflexively imposed on invitations to politically controversial speakers by student or faculty groups the neutrality or balance standards the IRS applies to voter education groups such as the League of Women Voters Education Fund or issue advocacy organizations such as environmental protection or consumer rights groups

when they sponsor candidate forums. In that context, the IRS has considered factors such as whether questions for candidates are prepared and presented by an independent nonpartisan panel, whether the candidates are given equal opportunity to present views on a broad range of topics of interest to the general public, whether a moderator implies approval or disapproval of the candidates, and so forth. As discussed above, tax rulings issued in the context of a college or university setting appropriately permit more leeway for student organization activities or curricular programs with valid educational objectives. The legitimate invitations of student or faculty groups should not be vetoed by university administrators because these invitations are said to lack balance.

Third, as the AAUP stated in a resolution in 1966 by its Fifty-second Annual Meeting, "the right to access to speakers on campus does not in its exercise imply in advance either agreement or disagreement with what may be said, or approval or disapproval of the speakers as individuals." Just as colleges and universities are not responsible for the many different opinions in the books and periodicals in their libraries, so invitations by authorized faculty and student groups to outside speakers do not imply either agreement or disagreement with what may be said, or approval or disapproval of speakers as individuals. Invitations to outside speakers by students or faculty reflect their academic freedom to hear, and not the official approval of a college or university. Universities and colleges may and sometimes should clearly affirm that sponsorship of a speaker or a forum does not constitute endorsement of the views expressed.

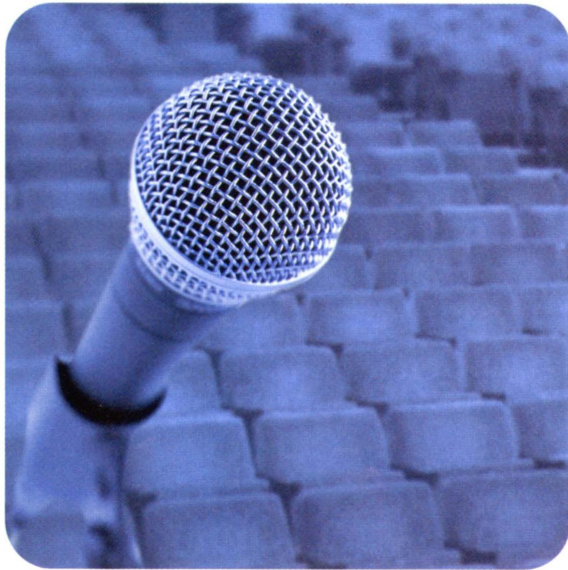
Consistent with the political prohibition of section 501(c)(3) and



with the values of academic freedom, universities and colleges can specify that no member of the academic community may speak for or act on behalf of the university or college in a political campaign. The idea that a university or college "participates" or "intervenes" in a political campaign by hearing speakers who have something to communicate about issues of relevance to the campaign is fundamentally misplaced. It utterly misconceives the role and responsibility of a university, which is not to endorse or oppose candidates, but to discuss issues of relevance to society.

### **Election Cycle Enforcement**

Pointing to a sharp increase in prohibited political activity by tax-exempt organizations, including churches and other charitable organizations, the IRS recently launched new enforcement and education programs on this issue. Last February, the IRS issued a report, the "Political Activities Compliance Initiative," on the results of its enforcement program during the 2004 election cycle. The agency found prohibited political activity in three-quarters of the cases it reviewed from the 2004



very broadly as follows: “This prohibition means 501(c)(3) organizations may not endorse candidates, distribute statements for or against candidates, raise funds for or donate to candidates or become involved in any activity that would be either supportive or opposed to any candidate.” The release did not specifically define what it meant by “any activity” that would be “either supportive or opposed” to any candidate.

During the summer of 2007, the IRS issued a report, *2006 Political Activities Compliance Initiative*, which compared the results of its fast-track enforcement efforts dur-

organizations examined had received a written advisory from the IRS of substantiated political intervention.

### **Absence of Clear Rules**

The IRS generally conducts a facts-and-circumstances inquiry to determine whether an organization has participated or intervened in an election by supporting or opposing a candidate for public office. A few rulings and court cases have identified specific activities that are prohibited, such as candidate endorsements and monetary contributions. In other cases, the characterization of an activity depends upon a careful balancing of highly contextual factors. There is little authoritative guidance on what constitutes prohibited participation or intervention in a political campaign in an educational setting.

In announcing its renewed compliance efforts in February 2006, the IRS emphasized that the lack of a bright-line test for evaluating political intervention presented “unique challenges” for the agency. At the same time, the IRS issued a fact sheet that discussed voter education and registration drives, candidate appearances and public forums, issue advocacy, voter guides, Web sites, and leasing and renting of facilities, among other issues. In June 2007, the IRS issued long-awaited authoritative guidance on the political prohibition. The guidance, which largely covers the same topics as the 2006 fact sheet, breaks no new ground but provides precedential authority in the form of a revenue ruling. Like the fact sheet, it contains a few specific college and university examples. In one, it held that a university did not intervene in a political campaign when its alumni newsletter printed an update from an alumnus which stated that he “is running for mayor” of a particular city but con-

## **A FEW RULINGS HAVE IDENTIFIED SPECIFIC ACTIVITIES THAT ARE PROHIBITED, SUCH AS CANDIDATE ENDORSEMENTS AND MONETARY CONTRIBUTIONS.**

election season. Of the eighty-two closed cases, three were proposed for revocation of tax-exempt status; fifty-five received written advisories for one-time violations and corrected the violations, primarily through recovering funds spent on the activity as well as taking measures to prevent recurrence; one was assessed an excise tax on the amount spent on intervention; eighteen were found not to have violated the political prohibition; and five were found to have non-political violations, including delinquent returns.

As a result of these findings, the IRS unveiled new fast-track procedures for the 2006 election season. It announced a new initiative to educate charitable organizations about the political prohibition and to crack down on organizations that violated it. In a press release issued in June 2006, the IRS explained the political prohibition

ing the 2006 election period with results from the 2004 election cycle. The IRS reported that it received an increased number of referrals alleging prohibited political activity in 2006; nevertheless, the number of referrals selected for examination remained “relatively consistent.” In addition, it found that “similar levels and types of allegations of prohibited political intervention occurred in both 2004 and 2006.” Because only a few 2006 cases had closed, the report did not address the attributes of closed 2006 cases. However, the IRS reported that as of March 30, 2007, with 105 closed cases out of a total of 110 cases from 2004 selected for examination, five nonchurch organizations had final revocations of their section 501(c)(3) status (with one revoked for reasons other than political intervention), two had proposed revocations, and about two-thirds of the church and nonchurch or-

tained no other reference to the election or his candidacy. In another, it held that an issue ad prepared and purchased by a university on the eve of a Senate vote on education legislation shortly before an election for party nomination of Senate candidates did not violate the prohibition. The ruling provided an example of prohibited campaign intervention by a university when its president endorsed a candidate for public office in a "my views" column of a monthly alumni newsletter, even though the president paid for the part of the cost of that issue of the newsletter attributable to the column. Although the ruling observes that "the political campaign intervention prohibition is not intended to restrict free expression on political matters by leaders of organizations speaking for themselves as individuals," it goes on to explain that "leaders cannot make partisan comments in official organization publications or at official functions of the organization." The ruling provided little additional guidance on politically controversial speakers in a college or university setting.

As the IRS acknowledged in its report on the 2004 election cycle, "activities that give rise to questions of political campaign intervention also raise legitimate concerns regarding freedom of speech and religious expression." In one such case, reported by the *New York Times* on September 22, 2006, an Episcopal church in Pasadena, California, regarded "an IRS investigation of an antiwar sermon delivered by the church's former rector on the Sunday before the 2004 election as an attack on freedom of speech and religion." These issues have proved troublesome for the agency as well as for the organizations subjected to investigation. Investigations of churches and other

nonprofits in response to news reports and complaints by watchdog groups have raised concerns about issues of free expression and religious freedom as well as undue political influence in the heightened governmental scrutiny of certain charitable organizations.

For example, six months after its February 2006 report, the IRS closed a controversial two-year probe of the tax status of the National Association for the Advancement of Colored People (NAACP). The investigation had been prompted by a July 2004 speech by NAACP chairman Julian Bond that was critical of President Bush. Free-

organizations involved potentially prohibited political activity. The audit thus provided no review of the substantive conclusions reached by the IRS in its investigations of those charitable organizations. Uncertainty about the line drawn by the government between prohibited political activity and permissible participation in public policy debate has a potentially chilling effect on legitimate, constitutionally protected speech.

### Conclusion

A firm commitment to academic freedom provides university and college communities with a princi-

**AS THE IRS ACKNOWLEDGED IN ITS REPORT ON THE 2004 ELECTION CYCLE, "ACTIVITIES THAT GIVE RISE TO QUESTIONS OF POLITICAL CAMPAIGN INTERVENTION ALSO RAISE LEGITIMATE CONCERNS REGARDING FREEDOM OF SPEECH AND RELIGIOUS EXPRESSION."**

dom of Information requests filed by the NAACP revealed that the IRS investigation followed complaints forwarded to the agency by a number of Republican politicians. After its investigation, the IRS concluded that the civil rights organization continued to qualify as an organization tax exempt under section 501(c)(3).

In response to complaints that some IRS investigations or examinations were politically motivated, the IRS commissioner asked the treasury inspector general for tax administration to review the process used in handling the complaints. The inspector general concluded in a 2005 report that the IRS had consistently followed its procedures; however, the scope of the audit did not include whether the activities by the tax-exempt

pled framework for complying with tax-exemption requirements without undermining the educational value of an open campus. Faced with pressures from constituencies offended by invited speakers' views and heightened government scrutiny of political activities of tax-exempt organizations, administrators may otherwise unduly restrict the right of campus groups to hear outside speakers. ☞