



Understanding the History and Impact of the Johnson Amendment – and Why It Chills Speech

The “Johnson Amendment” is a provision of the tax code that prohibits a certain class of nonprofits, including charities and churches, from engaging in candidate election campaigns. Named after its author, then-Senator Lyndon Baines Johnson, the Johnson Amendment was passed into law as part of the Internal Revenue Act of 1954. It says that a group may have 501(c)(3) status only if it also “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.”

The Johnson Amendment is a unique restriction on the speech and press rights of 501(c)(3) nonprofits. No similar language exists in the sections governing 501(c)(4) social welfare organizations, 501(c)(5) labor unions, or 501(c)(6) trade associations. Consequently, these groups are able to support or oppose candidates, make endorsements, and spend money to broadcast or promote political viewpoints.

The Johnson Amendment was likely created in the hopes of silencing groups that criticized Senator Johnson, but its chilling effect on speech persists to this day. The potential IRS penalty for even a minor violation of the Amendment is a death sentence for any group – a complete loss of its tax exemption.

Clearly, 501(c)(3) groups may not donate to candidates, parties, or PACs. Nor may such groups spend money on ads urging the election or defeat of any candidate. Beyond that, little is clear.

The most recent guidance, released by the IRS in June 2007, fails to clarify the reach of the law. In determining whether a 501(c)(3) nonprofit would violate the law, the IRS lists factors such as “[w]hether the statement is delivered close in time to the election” and “[w]hether the statement expresses approval or disapproval for one or more candidates’ positions and/or actions.”¹ The statements need not even reference a candidate by name.

How close is too close to the election? And how could, say, a Catholic faith leader preach his religion’s opposition to abortion without indirectly expressing “approval or disapproval” of candidate views on the topic? The IRS provides no clear answer.

Consider the impact of enforcing this law. Is it wise to place the IRS in a position to investigate what a preacher said from the pulpit the Sunday before Election Day? Is this a good use of IRS resources? Should faith leaders have to worry about deciding between exercising their First Amendment rights and keeping the lights on?

The same goes for nonprofits outside of the faith community. In October 2004, the IRS opened an investigation of the National Association for the Advancement of Colored People (NAACP) for a potential violation. A letter from the agency warned that the group had “condemned the administration policies of George W. Bush in education, the economy and the war in Iraq.” *The New York Times* reported that the

¹ Rev. Rul. 2007-41, 2007-25 I.R.B. (June 18, 2007). Available at: <https://www.irs.gov/pub/irs-drop/rr-07-41.pdf>, p. 8.

investigation was triggered by “a speech given by [then-NAACP] chairman, Julian Bond, at its annual convention last July in Philadelphia.”²

Such investigations are intrusive and an affront to the First Amendment. Worse, there is little reason to believe the IRS is capable of carrying them out effectively. The agency has already shown, through the Tea Party targeting scandal, that it lacks respect for First Amendment freedoms necessary to be trusted in this area.

The law, as written, goes too far. Its vague wording creates a legal environment ripe for abuses stemming from biased enforcement. It also forces the IRS, a tax-collecting agency, to devote resources better spent elsewhere. Lastly, its command that the IRS impose a death sentence by revoking a group’s tax exemption for violations puts the agency in an impossible position.

*History*³

In 1953, congressional staff began consolidating suggestions for revisions to the tax code, but nothing like the Johnson Amendment can be found in those documents. Suggested revisions to the category of exempt organizations instead focused on reducing the perceived advantage they enjoyed in competition with for-profit entities.⁴

The idea of amending the Internal Revenue Code in 1954 to prohibit political activities by certain exempt organizations may have come, not from tax specialists, but in part from the efforts of anti-communists in Congress to thwart support for radical groups. In April 1954, Congressman B. Carroll Reece led the Select Committee to Investigate Tax-Exempt Foundations and Comparable Organizations in investigating the political and propaganda activities of tax-exempt foundations.⁵ The Select Committee’s authorizing resolution specifically instructed the Committee to investigate the use of tax-exempt resources “for subversive activities, for **political purposes**, propaganda, or attempts to influence legislation.”⁶

These hearings commenced in May 1954, and drew to a close in July. Among the Committee’s conclusions: the then-current substantiality test was “a futility,” and “the tax law might better proscribe all political activity, leaving it to the courts to make exceptions on the principle of *de minimis non curat lex*.”⁷

By the time the Committee released its Report, the Code had been amended (by the Johnson Amendment) to prohibit political participation or intervention by groups exempt under 501(c)(3).⁸ Yet the Reece Committee (and its predecessor the Cox Committee) had spent months badgering foundations about whether they had used their resources for political purposes or propaganda. These allegations had made

² Michael Janofsky, “Citing July Speech, I.R.S. Decides to Review N.A.A.C.P.,” *The New York Times*. Retrieved on December 2, 2017. Available at: <http://www.nytimes.com/2004/10/29/politics/citing-july-speech-irs-decides-to-review-naacp.html> (October 29, 2004).

³ This section is excerpted from Allison Hayward, “Eternal Inconsistency: The Stunning Variability in, and Expedient Motives Behind the Tax Regulation of Nonprofit Advocacy Groups,” Institute for Free Speech. Retrieved on December 2, 2017. Available at: http://www.ifs.org/wp-content/uploads/2015/06/Hayward_Eternal-Inconsistency.pdf (June 2015).

⁴ See “Preliminary Digest of Suggestions for Internal Revenue Revision Submitted to the Joint Committee on Internal Revenue Taxation” (April 21, 1953) at 64-65. Two potential revisions touched on politics, but did not resemble the Johnson Amendment at all – one suggestion was to make graft payments (i.e. bribes and extorted payments) deductible “to the extent they are ordinary and necessary in the taxpayer’s business.” *Id.* at 21. The second suggestion would allow candidates who pay filing fees or otherwise bear costs of primary elections to deduct those expenses from gross income. *Id.* at 47.

⁵ Tax Exempt Foundations, Hearings before the Special Committee to Investigate Tax-Exempt Foundations and Comparable Organizations, 83rd Cong., 2d Sess. Part I at 433 (1954), (testimony of Norman Sugarman) (hereinafter “Hearings”).

⁶ H. Res. 217, 83rd Cong. 1st Sess., reproduced in *id.*, Part 1, at 1-2 (emphasis added).

⁷ *Id.* Part 3, at 95.

⁸ *Id.*

news.⁹ Perhaps this publicity primed the pump for Senator Johnson. At the very least, it may have called his attention to an area where he could advance popular legislation as well as further his personal political aims.

A number of sources describe the Johnson Amendment's legislative and political history, such as it exists.¹⁰ Briefly, Johnson introduced his amendment, seemingly out of the blue, during a July 2 Senate floor debate. His explanation for his amendment to Section 501(c)(3):

[T]his amendment [would deny] tax-exempt status to not only those people who influence legislation but also to those who intervene in any political campaign on behalf of any candidate for any public office.

He continued by stating that he had discussed the amendment with committee members and it was "acceptable to them."¹¹ The amendment was included in the final legislative draft, and enacted as part of the Internal Revenue Code of 1954.

Johnson's sudden interest in the tax treatment of exempt organizations was possibly pragmatic. Johnson had drawn a Democratic primary contender with deep pockets, who could depend upon support from anti-communist interest groups. These groups claimed exemption as educational organizations. Johnson went so far as to inquire of an IRS Commissioner (via an intermediary) whether their activities were in accord with existing law. Johnson received the Commissioner's inconclusive response on July 2, the day he offered the floor amendment.¹²

One article written soon after the Code's enactment observed:

In view of the fact that the substantiality concept has been applied in the legislative area, it would appear that the present Code should be construed to apply equally to the political campaign situation.¹³

At enactment, then, some reasonable minds believed the Johnson Amendment would only bar "substantial" political intervention for 501(c)(3)s.

Johnson himself seemed to understand that it wouldn't deter his right-wing detractors in Texas, unless they went beyond their extant activities to intervene specifically in campaigns – perhaps something he wanted to ensure wouldn't occur.¹⁴ Johnson also understood that his amendment would have no effect on entities that were exempt under a Code section other than Section 501(c)(3) – in fact, Johnson tapped staff to draft a reassuring memo to labor unions (exempt under 501(c)(5)) concluding that the measure "will have no

⁹ See "The Nation," *The New York Times* (May 16, 1954); "Education: Two-Edged Weapon," *TIME* (July 19, 1954).

¹⁰ See Howard Rea, *Changes in the Internal Revenue Code of 1954 Affecting Charitable Organizations*, 27 *Rocky Mtn. L. Rev.* 270 (1955); Lobbying and Political Activities of Tax-Exempt Organizations, Hearings before the Subcommittee on Oversight, Committee on Ways and Means, House of Representatives, 100th Cong. 1st Sess. (1987); Deirdre Halloran & Kevin Kearney, *Federal Tax Code Restrictions on Church Political Activity*, 38 *Cath. U.L. Rev.* 105 (1998); Patrick L. O'Daniel, *More Honored in the Breach: A Historical Perspective of the Permeable IRS Prohibitions on Campaigning by Churches*, 42 *B.C. L. Rev.* 733 (2001).

¹¹ 100 Cong. Rec. 9604 (1954).

¹² Halloran & Kearney, *supra* note 10, at 108. This was also the last day of deliberations by the Reece Committee. O'Daniel, *supra* note 10, at 765.

¹³ Note: *Income Tax Disadvantages of Political Activities*, 57 *Colum. L. Rev.* 273, 280 (1957). In 1955, a decision arising under the 1939 Code concluded that a group that devoted less than 5 percent of its time (and minimal expenses) on "political" and lobbying activities was entitled to an educational exemption. *Seasongood v. Comm'r*, 227 F.2d 907 (6th Cir. 1955).

¹⁴ O'Daniel, *supra* note 10, at 766.

effect upon labor organizations.”¹⁵ The same analysis should then apply to social welfare organizations, who, like labor unions, were exempted under a separate section of the Code.

Developing the Regulations: 1956 vs. 1959

With the enactment of the 1954 Code, Treasury started the lengthy task of writing regulations interpreting the new law. Johnson’s “absolute” prohibition (or ban on “substantial” election intervention, depending on your point of view) would evolve in dramatic and unanticipated ways.¹⁶

In Treasury’s initial Notice of Proposed Regulations, a 501(c)(3) exempt group could not engage in what might now be called “express advocacy,” but seemingly could engage in “issue advocacy.”¹⁷ Beyond the group’s activities, however, the IRS would also consider its purpose, and “may” deny an exemption under 501(c)(3) if the group’s purpose was campaign advocacy. If this reading is correct, this proposed regulation allowed 501(c)(3) exempt groups to discuss issues related to candidates during campaigns, provided they avoided express advocacy, and also maintained a primary purpose other than advocacy for or against a particular candidate.

Additionally, the Proposed Regulation specified that groups failing to qualify for exemption under 501(c)(3) because of their legislative agenda (or their controversial opinions) could be exempt under Section 501(c)(4).¹⁸ Given that one common question in this area was whether a particular group had done too much advocacy to be “educational,” the (c)(4) classification would remain the catch-all exemption for nonprofit advocacy groups.

However, something happened on the way to a Final Rule. Slightly more than three years after the initial publication of the Proposed Rule, the Commissioner of Internal Revenue withdrew it.¹⁹ The Commissioner replaced the 1956 regulation with language that looks much like the current regulations.

These revised regulations introduced the concept of the “action organization” that could never be exempt under Section 501(c)(3). A group would be deemed an “action organization” if a substantial part of its activities were attempting to influence legislation, if it participated in political campaigns, if its main objective could only be attained by legislation, and it advocated for this objective “as distinguished from engaging in nonpartisan analysis.”²⁰ The Rule notes that “action organizations” could qualify for exemption under 501(c)(4).

The 1959 Proposed Rule also defined “educational” for 501(c)(3) exemption, specifying that “an organization may be educational even though it advocates a particular position or viewpoint so long as it presents full and fair exposition of the pertinent facts as to permit an individual or the public to form an independent opinion... an organization is not educational if its principal function is the mere presentation of unsupported opinion.”²¹ The explanatory material in the January 1956 version of the Proposed Rule, which acknowledged that 501(c)(3) exempt groups could advocate on an issue being raised in a campaign, vanished from the 1959 version.

¹⁵ *Id.* at 765-66.

¹⁶ Notice of Proposed Regulation, Income Tax: Taxable Years Beginning After December 31, 1953: Exempt Organizations, 21 Fed. Reg. 460 (January 21, 1956).

¹⁷ *Id.* at 464.

¹⁸ *Id.* at 465. The proposed regulations were silent about whether groups exempt under Section 501(c)(5) (such as labor organizations) or groups exempt under Section 501(c)(6) (such as chambers of commerce) could also engage in such public advocacy or advocacy of legislation.

¹⁹ 24 Fed. Reg. 1421 (February 26, 1959).

²⁰ *Id.* at 1422.

²¹ *Id.* at 1423. Readers should know that the “full and fair exposition” standard was found unconstitutionally vague by the U.S. Court of Appeals for the District of Columbia Circuit in *Big Mama Rag v. United States*, 631 F.2d 1030 (D.C. Cir. 1980).

The 1959 Proposed Rule also set forth the key language that stirs debate today [on 501(c)(4) organizations] – that a group is “operated exclusively for the promotion of social welfare if it is primarily engaged in promoting in some way the common good and general welfare of the people of the community.” This version of the Rule also establishes that a “social welfare” purpose is consistent with 501(c)(3) – unless the group is an “action organization.” It furthermore establishes that the fact a group “advocates social or civic changes or presents opinion on controversial questions with the intention of molding public opinion” does not preclude exemption under 501(c)(3) – unless, again, it is an “action organization.”²² Finally, the 1959 Rule adds the admonition that “the promotion of social welfare does not include direct or indirect participation or intervention in political campaigns on behalf of or in opposition to any candidate for public office.”²³ These sections remain essentially unchanged in the Final Rule, published in June 1959.²⁴

The reason for the changes in the 1959 version is not clear. It is evident, however, that the new Rule offered clearer and more precise guidance (the invention of “action organizations” for instance), perhaps in response to criticisms that the first draft was vague. It also struck directly at Service interpretations that barred groups with social welfare purposes and groups that sought to influence public opinion from 501(c)(3) status.

As noted before, no transcripts or records survive from the IRS hearings held to consider the final rules. One newspaper account of an April 16, 1959 hearing reported only that attendees were critical of the rules, and feared they would deny exemptions to groups that were deemed exempt under the former rules.²⁵

Fear of the Service’s enforcement attitude may have been justified. At the Fourth Biennial Conference on Charitable Foundations in May 1959, Herman Reiling, the Assistant Chief Counsel for the IRS, remarked that the organizations giving the Service the most “trouble” were the “crusading organizations” that call their activities “educating the public” by “‘spraying’ information to the public.”²⁶ He seemed to feel the new regulations would allow this “trouble” to persist.

After 1959, the regulations governing the political activities of tax exempt nonprofits remained relatively stable. The aggressiveness of the IRS in certain contexts, its use and abuse by political leaders, and public outcry in response to misuse of the tax code also persisted. The intersection of taxation and activism remains a treacherous one for the activist.

Impact on Speech and Press Rights of 501(c)(3) Nonprofits

As noted earlier, some of the activities banned by the Johnson Amendment are clear. Charities may not spend money on ads endorsing a candidate. Charities may not donate to candidate committees, political parties, or political committees (PACs). Beyond that, little is certain. That’s a significant problem because vague laws chill First Amendment speech rights.

Vague laws are unconstitutional if they provide insufficient notice of what is regulated and what is not. If the law does not make clear what speech is allowed and what speech is not, speakers will curtail their speech more than they otherwise would to avoid violating the law. The security of free speech breaks down when citizens are left to guess how regulations apply. In the landmark campaign finance case, *Buckley v. Valeo*, the Supreme Court quoted an earlier decision to explain the importance of having clear rules for speech:

²² 24 Fed Reg. at 1423.

²³ *Id.* at 1424.

²⁴ T.C. 6391, published in 24 Fed. Reg. 5217 (June 26, 1959).

²⁵ “Tax Shift Scored by Exempt Units,” *The New York Times* (April 17, 1959).

²⁶ See New York University Fourth Biennial Conference on Charitable Foundations at 207 (Henry Sellin ed. 1959).

In short, the supposedly clear-cut distinction between discussion, laudation, general advocacy, and solicitation puts the speaker in these circumstances wholly at the mercy of the varied understanding of his hearers and consequently of whatever inference may be drawn as to his intent and meaning. ... Such a distinction offers no security for free discussion. In these conditions it blankets with uncertainty whatever may be said. It compels the speaker to hedge and trim.²⁷

Compounding the problem is the fact that the Johnson Amendment is enforced by the Internal Revenue Service, an agency that knows little about the First Amendment. Just a few years ago, the Tea Party scandal under Lois Lerner gave the IRS a black eye and greatly harmed people trying to exercise their First Amendment rights. It is unlikely that the IRS is equipped to competently enforce or give guidance to regulated entities on complying with the Johnson Amendment.

Other Impacts of the Johnson Amendment

In its current form, the Johnson Amendment is simply unworkable. Enforcement is rare, penalties are severe, and guidance is unclear. Beyond regulating the raising and spending of money to promote political viewpoints, the Johnson Amendment also bans pure speech in the form of endorsements that cost nothing. As a result, full compliance cannot ever be guaranteed unless tax agents attend every religious service and charitable group meeting. This is obviously unrealistic and undesirable. Yet without it, there can be no ensuring that government will not enforce the Johnson Amendment only against unpopular churches and charities.

The key goal of the Johnson amendment – barring the use of tax-deductible contributions to finance election campaigns – is widely supported and could be preserved with more precise language in the law. It could be clarified with a precise definition of election campaign intervention. That definition could ban contributions to parties, candidates, and any political organization described in Section 527 of the Internal Revenue Code. The Amendment could also ban external communications that involve spending money, clearly identify a candidate, and contain “express advocacy,” a well-known term in campaign finance law, urging the election or defeat of a candidate or candidates, or candidates of a political party. All groups could be allowed to endorse or oppose candidates in internal communications.

Conclusion

Regulations that impact the ability to exercise First Amendment rights should be clear and easy to follow. The Johnson Amendment fails that test. Its focus on speech rather than money; its use of unclear words like “participate” and “intervene;” and its delegation of enforcement powers to the IRS all combine to chill speech and place the IRS in an impossible situation. Policymakers should be eager to seek alternative approaches that clarify and improve the law for regulators and 501(c)(3) nonprofits alike.

About the Institute for Free Speech

The Institute for Free Speech is a nonpartisan, nonprofit 501(c)(3) organization that promotes and defends the First Amendment rights to freely speak, assemble, publish, and petition the government. Originally known as the Center for Competitive Politics, it was founded in 2005 by Bradley A. Smith, a former Chairman of the Federal Election Commission. The Institute is the nation’s largest organization dedicated solely to protecting First Amendment political rights.

²⁷ *Buckley v. Valeo*, 424 U.S. 1, 79-80 (1976) at 43 (quoting *Thomas v. Collins*, 323 U.S. 516, 535 (1945)).