



How to Amend the Johnson Amendment

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In 1954, to help stop his political opponents, then Senator Lyndon Johnson introduced an amendment to the tax code to bar tax-exempt entities from involvement in political campaigns. The “Johnson Amendment” was passed and became part of federal law:

Corporations . . . organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes . . . [can]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.¹

Thus, the Johnson Amendment prevents such non-profit organizations (including religious non-profits and churches)² from taking action or making statements for or against a candidate for public office if they want to remain tax exempt.

What is the problem?

First, the current IRS guidance interpreting and enforcing this law is incredibly vague. Participation and intervention in political campaigns is ill-defined. No one knows precisely what kind of spoken or written comment on a candidate will draw the attention of the IRS. Even the IRS itself does not clearly describe what would violate the law; at one point, it states “[c]ertain activities or expenditures *may* not be prohibited depending on the facts and circumstances.”³ This vagueness chills free speech. For example, a non-profit organization focused on environmental issues, and that regularly publishes a newsletter on conservation projects may want to briefly highlight a candidate’s efforts in connection with a conservation effort. But if the entity does not know if its statement will cause the IRS to withdraw its tax-exempt status, it will err on the side of caution and say nothing. This is unfortunate because many tax-exempt social welfare organizations have much to contribute to the public policy debate in their area of expertise. In a recent, in-depth report, the Commission on Accountability and Policy for Religious Organizations (Commission) found the current situation surrounding the Johnson Amendment to be “untenable” partly because the “vagueness in official guidance related to the law chills permissible speech, causes confusion among nonprofit organization leaders, and makes the law difficult for the IRS to administer.”⁴ Moreover, to this day, the IRS has remained secretive about the “new procedures” it has acknowledged adopting to monitor churches’ political involvement.⁵

Second, as the Commission found, the IRS currently ignores activity it believes to be unlawful. There are documented examples of this occurring in the context of churches. In fact, a program led by Alliance Defending Freedom and championed by Family Research Council called “Pulpit Freedom Sunday” encourages pastors to speak on political matters, including on political candidates.⁶ Despite churches sending the IRS their sermons in which pastors engaged in what the IRS itself describes as a violation of the Johnson Amendment, the IRS has not threatened the tax exempt status of these churches.⁷ For some

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churches (most notably African-American churches), political engagement is inextricably steeped in their history and culture – the political involvement of these communities has contributed to important achievements in the civil rights movement (Dr. Martin Luther King was a clergyman) – and they will continue to so engage.⁸ Whether the IRS’s lack of enforcement of the law is due to being frightened by the public perception of prosecuting churches, or because the agency knows the Johnson Amendment is unconstitutional when applied in this context, is unclear. Yet even with a lack of enforcement, the Johnson Amendment has created a chilling effect on churches. Pastors often *incorrectly* fear the law prevents any discussion of political matters, wrongly believing it bars them from mentioning politicians’ names at all, or from encouraging members of their congregation to vote. Most pastors want to be good citizens and obey the authorities. Thus, they self-censor due to their incorrect fears and the IRS’s overly vague and restrictive guidance. The stifling effect of the Johnson Amendment is exacerbated by the fact that some activist atheist organizations use it to write letters to churches warning of impending doom at the hands of the IRS if they do anything wrong (or even engage in activities which may not be unlawful).⁹ The combination of self-censoring and activist threats has the effect of suppressing the speech of pastors who wish to be good citizens but still address political matters. The Johnson Amendment may not have been intended to suppress pulpit speech when it was passed, but it certainly has the unfortunate effect of being used in this way today.

Third, while the IRS has infrequently targeted churches, it has selectively enforced the law, targeting certain non-profit organizations while ignoring others who engage in similar behavior. For example, the IRS initiated an investigation of the NAACP after its chairman gave one speech that included negative commentary on George W. Bush’s presidential candidacy. While the IRS subsequently closed the investigation and refunded the excise tax the NAACP had paid, the organization had been dragged through a two-year process by that point. The fact that the IRS would spend resources on such an investigation while doing nothing to act against numerous churches that have engaged in similar activity “results in a lack of respect for the law and its administration.” As the Commission noted, it is “not fair” to expect such “organizations to comply with a law that is regularly violated” by others “with impunity.”¹⁰ All 501(c)3 nonprofits, religious and otherwise, should be able to engage in no-cost political communications free from the threat of impending government prosecution. The Johnson Amendment is almost certainly an unconstitutional restriction on free speech, and its suppression of speech must be corrected.

How do we fix this?

There have been efforts in Congress to correct these problems by completely repealing the Johnson Amendment. The legislation has not passed. The Commission’s recommendations for addressing the above-mentioned problems while recognizing concerns over turning non-profits or churches into purely political entities are as follows:

- 1) Amend Section 501(c)3 to *permit statements regarding political campaigns* (which may urge listeners to elect or defeat a candidate, or contribute to a candidate or a certain political organization) unless the exempt organization:
 - a. Makes the statement outside of the organization’s ordinary course of its regular activities and in furtherance of its exempt purpose,
 - b. Incurs more than *de minimis* incremental costs in making its statement, or
 - c. Contributes money, goods, services, or use of facilities to a candidate for public office or to a political organization described in Section 527(e)(1).

- 2) Limit the penalty for a violation of these new standards to excise taxes imposed under Section 4955, “unless such activity is willful and substantial or frequent in relation to the organization’s activities as a whole.”
- 3) Repeal Section 7409, which permits the IRS to seek an injunction to prohibit 501(c)(3) organizations from engaging in prohibited political communication.

Why these changes?

Amending the Johnson Amendment in this way, and not simply repealing it entirely, relaxes the speech restrictions on all Section 501(c)3 nonprofit entities (regardless of their organizational purpose and political views) and allows them the breathing room to communicate, in the course of conducting their regular day-to-day activities, on how a candidate has handled their issue(s). At the same time, these amendments still prevent tax exempt entities from abusing their organizational purpose by financing a candidate or buying political advertisements to get them elected.

The groups that would benefit from these changes, do not, in the words of the Commission, “generally seek the ability to take tax-deductible contributions made by donors and relay them to political campaigns. Rather, they generally seek freedom of expression in the context of their ordinary tax-exempt activities.”¹¹ Under these amendments, a church can highlight a candidate advancing the issues it cares about, a public health organization can commend an elected official who has been supportive of its work, a criminal justice reform group can highlight a politician who has worked on that cause, and so forth. These amendments would extend the same speech protections to all tax-exempt entities (both religious and nonreligious), regardless of their organizational mission, on both sides of the political aisle.

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¹ 26 U.S.C. § 501(c)3.

² See *Branch Ministries v. Rossotti*, 211 F.3d 137, 142 (D.C. Cir. 2000).

³ “The Restriction of Political Campaign Intervention by Section 501(c)(3) Tax-Exempt Organizations,” Internal Revenue Service, accessed September 7, 2016, <https://www.irs.gov/charities-non-profits/charitable-organizations/the-restriction-of-political-campaign-intervention-by-section-501-c-3-tax-exempt-organizations>.

⁴ “Government Regulation of Political Speech by Religious and Other 501 (c)3 Organizations,” Commission on Accountability and Policy for Religious Organizations, at 15 (2013) [hereinafter “Commission Report”], <http://religiouspolicycommission.org/CommissionReport.aspx>.

⁵ Alliance Defending Freedom, “ADF asks federal court to tell IRS to come clean on secret rules for investigating churches,” press release, April 8, 2016, <http://www.adfmedia.org/News/PRDetail/9600>.

⁶ “Pulpit Freedom Sunday,” Alliance Defending Freedom, accessed September 7, 2016, <https://www.adflegal.org/issues/religious-freedom/church/key-issues/pulpit-freedom-sunday>.

⁷ Commission Report, 18-20.

⁸ *Ibid.*, 20-21.

⁹ E.g., Americans United for Separation of Church and State, “Americans United Reminds Houses Of Worship To Stay Out Of Partisan Politics,” press release, October 8, 2014, <https://au.org/media/press-releases/americans-united-reminds-houses-of-worship-to-stay-out-of-partisan-politics>.

¹⁰ Commission Report, 22, 25-26.

¹¹ *Ibid.*, 27.