

Beginning of the End for the Johnson Amendment (501-c-3)



By Paul Engel

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- The Johnson Amendment was passed over 70 years ago.
- It has been used to silence churches, charities, and other non-profits for decades.
- Congress is considering a bill they think will help.

How many of you know about the Johnson Amendment? Because if you've ever donated to a church or other charity, you've been impacted by it. This limitation on freedom of speech has been in effect for over 70 years. Now the House of Representatives is trying to remedy this infringement.

Johnson Amendment History

To understand what the House of Representatives is trying to do, we have to go back to the beginning, and to one Lyndon B. Johnson. In 1954 incumbent Lyndon Johnson was running for re-election to the United States Senate against Texas State Senator Dudley Dougherty. At the time Johnson seemed to be in a comfortable lead in the polls. Comfortable that is, until a couple of non-profit organizations, backed by extremely powerful leaders, stepped in.

H.L. Hunt had created an organization called Facts Forum in 1951, and Frank Gannett had created the Committee for Constitutional Government back in 1935. Both of these groups were anti-communist and supporting Dougherty in the race for the U.S. Senate seat. Concerned that Johnson was soft on

Communism, both of these organization passed out thousands of pieces of literature in opposition to Johnson's campaign. When these actions started seriously hurting Johnson's campaign, he sought ways to silence them. Try as he might, Johnson could not find a law that these organizations were breaking.

On July 2, 1954, Johnson presented an amendment to a pending tax overhaul bill. The amendment passed on a unanimous voice vote, the bill was passed, and signed into law by President Eisenhower on August 16, 1954. There were no committee hearings or legislative analysis on the amendment, just a rushed vote. In an interview years later, a staff member stated that Johnson never had churches in mind for the amendment. There was nothing any church had done to warrant this restriction, but they got caught up in this amendment because their tax exempt status is codified in the same section of the law. According to Johnson's staffer, "This amendment had nothing to do with "separation of church and state." However, it has been used for decades as a threat to keep churches and ministers from engaging in public debates about so-called "political" issues.

The Johnson Amendment

Let's start with the law regarding tax exception.

An organization described in subsection (c) or (d) or section 401(a) shall be exempt from taxation under this subtitle unless such exemption is denied under section 502 or 503.

[26 USC §501\(a\)](#)

We start with three sections of the law that will describe tax exempt organizations. That is unless they are denied exception under sections 502 or 503. This includes the most well known section of the tax law, §502(c)(3).

The following organizations are referred to in subsection ...

(3) Corporations, and any community chest, fund, or foundation, organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes, or to foster national or international amateur sports competition (but only if no part of its activities involve the provision of athletic facilities or equipment), or for the prevention of cruelty to children or animals,

[26 USC §501\(c\)](#)

While there are several types of organizations, and several purposes that would make them tax exempt, the two most commonly used are religious and charitable organizations. I'm sure most people have a basic understanding of what a religious or charitable organization is, but where dealing with the law and details matter. This is where the Johnson Amendment comes into play.

... 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.

[26 USC §501\(c\)](#)

You can be a religious or charitable organization, but if you want your tax exempt status you had better not participate in any political campaign either for or against a candidate. Do you see what Johnson was doing? His campaign was being beat up by charitable organizations, so he used his considerable power as a United States Senator to stop it. Oh, yeah, and you had better not try to influence any legislation or your tax exempt status would be on the chopping block as well.

Notice, this language doesn't prohibit religious or charitable

organization from participating in campaigns, or influencing legislation, it only threatens them with the removal of their tax exempt status. But there's more. Most organizations I've talked to where this topic comes up believe that the mere mention of a candidate or legislation would threaten their status, and the law says they cannot use a "substantial part of the activities" they perform for these purposes. Such is the state of the misunderstanding of the Johnson Amendment.

The Free Speech Fairness Act

Enter the 119th Congress, and The Free Speech Fairness Act. The specified goal of this act is:

SEC. 2. ALLOWING 501(c)(3) ORGANIZATION TO MAKE STATEMENTS RELATING TO POLITICAL CAMPAIGN IN ORDINARY COURSE OF CARRYING OUT ITS TAX EXEMPT PURPOSE.

[Free Speech Fairness Act](#)

Isn't this nice, Congress wants to allow 502(c)(3) organizations to exercise their free speech rights. Maybe that title is just poorly worded. Maybe the language of the legislation will be better.

“(1) IN GENERAL.—For purposes of subsection (c)(3) and sections 170(c)(2), 2055, 2106, 2522, and 4955, an organization shall not fail to be treated as organized and operated exclusively for a purpose described in subsection (c)(3), nor shall it be deemed to have participated in, or intervened in any political campaign on behalf of (or in opposition to) any candidate for public office, solely because of the content of any statement which—

“(A) is made in the ordinary course of the organization's regular and customary activities in carrying out its exempt purpose, and “

(B) results in the organization incurring not more than de

minimis incremental expenses.''.

Free Speech Fairness Act

Should this legislation pass both houses of Congress and be signed by the President, we will trade one somewhat vague standard for another. Don't get me wrong, I love the idea of Congress no longer trying to use the threat of revoking tax exempt status because one Senator was getting beat up by a couple of charitable organizations, but I think this could be better.

For example, the current standard for a religious or charitable organization to express their opinions about legislation or candidates is "no substantial part of the[ir] activities." Tell me, what constitutes a "substantial part of activities"? Is it the amount of time spent? The amount of money spent? Or just what some bureaucrat thinks is advantageous at the time? This gets replaced with "the ordinary course of the organization's regular and customary activities." What are the ordinary course of activities for a religious organization? And who decides what is ordinary and what isn't? A minister speaking from a pulpit seems like an ordinary activity to me, but what if that same minister speaks at a rally or legislative committee hearing? If a charitable organization serves meals in a building they own or rent, that seems like an ordinary activity, but what if they do so in a public park?

Then there's the question of "de minimis incremental expenses." This is a legal term for something so small the law doesn't care about it. For example, in a million dollar deal, a \$10 mistake is considered "de minimis." So what is a "de minimis incremental expense"? Is it 1% of the organization's budget or 10%? Is it \$100 or \$1,000,000?

Once again, it appears Congress wants to pass a vague law and let the executive bureaucracy fill in the blanks. And we've

seen how that has worked out over the years.

Conclusion

The Johnson Amendment is the very definition of arbitrary and capricious. It was introduced by a United States Senator to protect his own re-election campaign. It was targeted not only at the non-profit organizations, some of whom were impacting Johnson's campaign, but at religious and other organizations. And the language was so vague as to have allowed decades of churches, charities, libraries, and educational non-profits to work in fear that simply saying the wrong thing could not only deprive them of their tax-exempt status, but the donations that are frequently given because of that status. That alone should be sufficient reason to simply rescind the amendment.

And why should an organization not be allowed to speak their position on a piece of legislation or a candidate as a condition of their tax exempt status? Should a group of people, peaceably assembled for religious or charitable purposes, not be allowed to speak on topics of public interest?

Interestingly enough, to my knowledge, the Johnson Amendment has never been challenged in court. I've even heard of organizations that not only encouraged ministers to preach on the subjects of candidates and legislation for the specific purpose of filing a complaint with the IRS. Why would someone do this? Because they believe the Johnson Amendment would not survive a First Amendment challenge in federal court. These organization hope that the IRS would threaten their tax exempt status, which would give them standing to sue. To my knowledge, even though thousands of legitimate complaints have been filed by these organizations, not a single tax exempt status has been threatened or revoked. Could it be that the IRS isn't as sure about the constitutionality of the Johnson Amendment as many might think?

Rather than getting rid of this bad law, Congress seems to want to tweak around the edges. While not the best solution, I think it would be better than what we have now. This legislation is still in progress. Maybe we can convince our elected representatives to make it better before the final vote.

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