

It's Going To Be A Bumpy Ride Until Election Day

07.18.22 | Linda J. Rosenthal, JD



In the United States, it's no exaggeration to say that a new campaign season begins the morning after the polls have closed on the last one.

For the nation's 501(c)(3) organizations, that means steering clear of the Johnson Amendment from one election day to the next. In the early weeks and months, that may be relatively easy, driving through occasional twists and turns. But inch closer to what is (this time, quite accurately) "the most important election of our lifetimes," and the terrain grows more treacherous.

Imagine one of those impossibly narrow roadways in a remote mountain region, winding up a craggy hill side. There are many razor-sharp turns but few guardrails. Most dangerous, though, are slides of rock or snow.

And so it was, at the end of the U.S. Supreme Court's term, that the high-court majority triggered avalanches: day after day until June 2022 dissolved into their Summer Recess.

Not Falling Off the Cliff

To help with the navigation in this year's challenging journey to Tuesday, November 8, 2022, there are new and updated explanations and guidance on the electioneering and advocacy rules from a variety of authoritative sources.

Joint Committee Report

The highly influential Joint Committee on Taxation has recently issued a new 35-page report: [JCX-7-22](#) (April 29, 2022). Titled *Present Law And Background Relating To The Federal Tax Treatment Of Political Campaign And Lobbying Activities Of Tax-Exempt Organizations*, it "provides an overview of present-law rules governing the political campaign and lobbying activities of tax-exempt

organizations, a description of present-day disclosure rules ..., and data relating to such organizations.”

See also: helpful summaries, excerpts, and observations in [Joint Committee on Taxation: Political and Lobbying Activities of Tax-Exempt Organizations \(April 2022\)](#) (June 4, 2022) Gene Takagi, Esq., [NEO Law Group Blog](#) as well as [Joint Committee on Taxation Report on Tax Treatment of Political Campaign and Lobbying Activities of Tax-Exempt Organizations](#) (June 17, 2022), Cory Halliburton, Esq., [Freeman Law, jdsupra.com](#).

Often referred to within tax circles simply as “the Joint Committee,” the JCT is a [nonpartisan Congressional committee](#) with 5 Democrats and 5 Republicans. Founded in 1926, it “assists Members of Congress of both parties in both the Senate and the House of Representatives” aided by a professional staff of Ph.D. economists, attorneys, and accountants.

In connection with this new publication, the Subcommittee on Taxation and IRS Oversight of the Senate Committee on Finance held a public hearing on May 4, 2022, entitled “Laws and Enforcement Governing the Political Activities of Tax Exempt Entities.” See official Finance Committee webpage including [video of full hearing](#). That site also includes text of prepared opening remarks of chair Sen. Sheldon Whitehouse (D-RI) [here](#), of ranking member, Sen. John Thune (R-SD), [here](#), and of witnesses including FPLG friend and colleague, Philip Hackney, Associate Professor of Law, University of Pittsburgh School of Law [here](#).

• *Current IRS Publications and Updates*

Recently updated resources from the Internal Revenue Service include:

- [The Restriction of Political Campaign Intervention by Section 501\(c\)\(3\) Tax-Exempt Organizations](#) (page last updated or reviewed, June 17, 2022)
- [Frequently Asked Questions About the Ban on Political Campaign Intervention by 501\(c\)\(3\) Organizations](#) (page last updated or reviewed January 21, 2022)

Of course, there’s the [text itself](#) of the “Johnson Amendment”: the 31-word phrase tacked onto the end of section 501(c)(3) of the Internal Revenue Code. It states the definition of which organizations qualify for the most favorable tax-exempt status:

(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, no part of the net earnings of which inures to the benefit of any private shareholder or individual, 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. (emphases added)

The penultimate phrase, beginning with “... no substantial part of the activities of which is carrying on propaganda, ...” is the entirety of the lobbying-limits restriction.

• *Bolder Advocacy*

Perhaps the most comprehensive source of guidance on the politics and lobbying restrictions is the [Bolder Advocacy](#) program of the Alliance for Justice. It's recognized as a leader in nonprofit advocacy. Check out the website, noting – for example – one of the most recent entries, added on the day that the leaked draft of the abortion ruling first appeared in the nation's news headlines: [Nonprofits Have a Right and Responsibility to Respond to Dobbs v. JWHO](#) (May 5, 2022) Leslie Barnes.

We've touted this phenomenal resource a number of times; most recently, earlier this year in [New Resources for "Nonprofit Advocacy"](#) (February 16, 2022).

Last week, they updated an important chart: [Comparison of 501\(c\)\(3\) and 501\(c\)\(4\) Permissible Activities](#).

. ***National Council of Nonprofits (NCN)***

See the website [generally](#) as well as specific features including the section on ["Everyday Advocacy."](#)

Check out as well the websites of the chapter affiliates around the nation including – for instance – the California Association of Nonprofits (CalNonprofits) and its section titled [Advocacy](#). Another example is from the North Carolina Center for Nonprofits: [Answers to Common Questions About Nonprofits and the 2022 Election](#) (last updated: April 5, 2022), David Heinen, Vice President for Public Policy and Advocacy.

. ***Learn Foundation Law***

[Learn Foundation Law](#) is an outstanding, free of charge, e-training resource on the legal issues in grant making. The project was created in 2010 by several major foundations as a public service. See our earlier post: [Foundation Law: Free Online Learning](#) (January 10, 2019).

Courtesy of Paul Strefkus at [EO Tax Journal](#), we are reminded by Maya, the site's delightful animated-cartoon host, that Learn Foundation Law has the following relevant courses: [Electioneering Rules for Private Foundations and Public Charities](#) and [Advocacy & Lobbying: Rules for Public Charity Grantees of Private Foundations](#).

About These Restrictions

The schedule of the upcoming ABA Tax Section, EO Committee, meeting in September 2022 is set to include discussions on the Johnson Amendment and the lobbying restrictions.

There are subtle changes afoot on how to describe these hot-potato conversations. (Again, courtesy of editor Strefkus at EO Tax Journal via committee chair Rosemary Fei, Esq. of Adler & Colvin), a panel session's title has been tweaked. The original "Charities and the First Amendment: Questioning the Constitutionality of Political and Lobbying Limitations" is now called "Charities and the First Amendment: Questioning Lobbying Limitations and the Campaign Intervention Prohibition."

Conclusion

It all begs the long-overdue question: How and why did the brief but consequential phrases comprising the 100% politics ban (as well as the similarly concise text of the lobbying limits) make

their way into Section 501(c)(3)?

Surely, you say, the long-ago legislators of 1954 writing a comprehensive overhaul of the federal tax code must have taken great care developing and drafting these major elements of the new tax-exemption statute!

Think again.

We've already covered that particular episode of legislative malice and malpractice by then-Senate Majority Leader Lyndon B. Johnson. See [*The Political Ban in 501\(c\)\(3\): Its OddHistory*](#) (March 23, 2016).

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