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NONPROFITS: POLITICAL ISSUES

Johnson Amendment Second Morsel: Escape Routes

03.31.24 | Linda J. Rosenthal, JD

For seven decades, the Johnson Amendment has hovered disquietingly over philanthropy in the United States.

A mere 27 words long*, it was a run-on sentence fragment slapped onto the tail end of the brand new section 501(c)(3) of the Internal Revenue Code of 1954. No one knew anything about it until, at the eleventh hour, the powerful Senate Minority Leader, Lyndon B. Johnson, drafted the language, and got it approved via a "floor amendment" with no debate or deliberations at all. [*Currently, there are 31 words.]

"Myths abound…" still, about whether, or to what extent, a tax-exempt charitable organization may jump into the political fray as each election cycle heats up.

All too often, seventy years later, harried 501(c)(3) executive staffers and board members still report they are confused and concerned about it. They throw up their hands and avoid it entirely. That's not an unreasonable response, considering there's a scary law out there, the violation of which can bring devastating consequences.

Is that the best or only response? Certainly not. Not for the 501(c)(3) with an important mission. Not for the charitable community. And not for American society as a whole.

A recent sobering report issued through Independent Sector highlights a worrisome larger trend. See *The Retreat of Influence: Exploring the Decline of Nonprofit Advocacy and Public Engagement* (July 2023) Faulk, L. Kim, M., and MacIndoe, H., Independent Sector. ["Nonprofits today are less aware of the advocacy and lobbying activities they are legally allowed to do compared to 20 years ago."]

Bite-Sized is Best

In late January, sensing this sector-wide anxiety, we proposed offering a "back-to-basics refresher" presented "in small, easily digestible portions." See *The Johnson Amendment: Bite-Sized Morsels for 2024* (January 24, 2024) and *Johnson Amendment Bite-Sized Morsels: The First* (March 12, 2024).

The key target audience for this series is the random 501(c)(3) official who's out there right now wondering if it's crazy even to consider wandering anywhere near the Johnson-Amendment vicinity.

After all, the stakes couldn't be higher on November 5, 2024. (We say that every year, but – sadly – it's true this time.) If an organization's mission is to save the world or just make it a slightly better place, how can its dedicated leaders justify to themselves, much less everyone else, sitting out this election cycle?

What Do People Want To Know?

Over and over, charitable-organization leaders ask similar and quite basic questions:

- "What is allowed? What is not allowed? And what in the world is this 'Johnson Amendment' that so many people mention whenever the topic of 501(c)(3)s and politics pops up?"
- "What are the rules? Is there a link to a single, definitive statute?"

We've already explained the mystery of the shorthand "Johnson Amendment" in our March 12th post that, in turn, links to an earlier post: *The Political Ban in 501(c)(3): Its Odd History* (June 23, 2016).

The "single, definitive statute" is philanthropy's favorite: Section 501(c)(3) with special emphasis on the Johnson Amendment segment. (By the way, in its entirety, this subparagraph (c)(3) includes just a bit over 130 words.)

You may ask, how in the world can a mere 31 words be enough to qualify as the "governing statute" or "governing law" of the most feared rule in the charitable world?

Here's How.

There's no hard and fast rule about the appropriate length for any statute, much less a tax provision. In a perfect world, it should meet the Goldilocks test of being "just right."

Some of the tax statutes in the field of exempt organizations are painfully long and complex. Consider, for instance, Section 514: Unrelated Debt Financed Income. And certain of the lesser-known provisions living in the close neighborhood of subparagraph (3) of section 501(c) are surprisingly detailed. For example, subparagraph (12) B (ii), on mutual or cooperative telephone companies, mentions income received from "qualified pole rentals."

There's a basic legal-research rule that first-year law students learn in the first week or two. It's called The Hierarchy of Authority. There's also a specialized version for tax research that explains how the various levels of Treasury and IRS regulatory and subregulatory guidance publications are ranked in priority.

"When we refer to 'authority' or 'primary authority,' we mean 'the law,'" explain the law librarians at Florida A&M University, adding: "The law being a constitutional or statutory provision, an administrative regulation or a court opinion. 'Secondary authority' refers to material that is NOT the law, but that which leads you to the law or helps to explain the law.'"

Why mention these hierarchy rules here? Because Section 501(c)(3) is a powerhouse, landmark statute – punching way above its weight. As often happens in American jurisprudence, a bite-sized statute of importance can be plumped up dramatically and embellished generously with assistance by other primary and secondary sources.

That's what happened here. Almost every word of section 501(c)(3) except "and" and "the" has been sliced and diced, poked and prodded, and put under a microscope to ascertain the "meaning" through reference to other primary sources and mountains of secondary sources. Just imagine what the single word "educational" must have endured.

Wiggle-Room Analysis

Of course, that "hierarchy of authority" review of the full 501(c)(3) text certainly applies to our specific hunt for the meaning and intent of the Johnson-Amendment language alone. Every word has been the subject (or perhaps more accurately, victim) of relentless and particularly penetrating analysis. The full text is:

- "… 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." [**bolding** is for the 1986 amendment]

Now consider the text viewed differently – as a vertical tower. That's how academics, professional advisors, and other experts pull it apart to pinpoint the precise intent and effect and to specify which words or phrases are ambiguous or vague:

- *… 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."*

In the next posts, we'll consider some of the experts' advice on what types of interactions with "politicians" – i.e., lawmakers, administration officials, or others in government) won't run afoul of the rules.

Conclusion

That's the strategy for this series. Identify precisely what types of contacts are definitely or likely *outside* the scope of the Johnson Amendment.

There's much more wiggle room than you may think. Ask an average colleague in the charitable sector to describe the scope of this ban. Many people will make a rather breathtakingly broad guess, based on the high anxiety-level connected with this issue.

But the Johnson Amendment text does ***not*** read: "Do not even breathe in the direction of a politician running for office or for reelection" or anything so sweeping. (Perhaps it could have, because LBJ had the apparent power to draft and strong-arm passage of almost anything he wanted here. But that didn't happen.)

Instead, take notice that the exact language in the statute is not expansive at all. The experts and officials writing the abundant primary and secondary authority have helpfully pointed out where there are escape hatches.

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