

# Newest Twists on the Johnson Amendment

08.09.17 | Linda J. Rosenthal, JD



The “Johnson Amendment” has been confusing and controversial since it was tossed into 501(c)(3) of the Internal Revenue Code in 1954. That year, Congress decided it was time to completely overhaul the existing federal tax code.

At the 11th hour, without discussion or debate, then-Senate Majority Leader added the last few words to an already succinct 132-word definition of which organizations can qualify for the most preferred category of tax exemption. In [“The Political Ban in 501\(c\)\(3\): Its Odd History,”](#) we explained the unusual and apparently unsavory circumstances in which this happened. Now, in 2017, the Johnson Amendment has flared up as a focal point in the political culture wars.

## *From Sleeper to Red-Hot Issue*

There’s always been chatter about whether a restriction on political activity – either 100% or some lower percentage – is a good or bad idea. It flared up during the 2016 campaign season, but few changes were realistically seen on the horizon. After November, with the prospect of a GOP-controlled Congress *and* White House, the possibility of making a change has become real. We posted about this in [“Maybe ‘Never Mind’ about That 501\(c\)\(3\) Ban on Politics.”](#)

The focus of the discussion during the spring of 2017 was on potential Congressional action; it’s a statute, so it can be amended out of existence. The arguments for and against a change are presented in [Will The 501\(c\)\(3\) Politics Ban Be Repealed?](#)

Then, seemingly out of the blue, the White House announced an executive order on May 4, 2017, that included references to the Johnson Amendment. What do experts think about this unexpected development? We reported on initial reactions in [“501\(c\)\(3\) Politics Executive Order: What Effect?”](#); the consensus is that “[i]t’s a nothingburger.”

## *Newest Developments on Johnson Amendment*

Before the May 4th Executive Order, speculation had “focused on whether lawmakers would seek a change by stand-alone legislation or include it as part of a comprehensive tax-overhaul package. Any strategy adopted takes into consideration the arcane rules of Congressional procedure that govern whether a simple majority is needed or if the GOP must find 60 votes.

Some hint about the next moves came on June 29, 2017, as a subcommittee of the House Appropriations Committee considered a markup of the lengthy 2018 Financial Services and General Government Appropriations bill.

The day before, there was a press release from the House Appropriations Committee including some information about how the appropriations legislation under consideration will make changes at the Internal Revenue Service.

“Those of most direct interest to nonprofits include:

- A prohibition on a proposed regulation related to political activities and the tax-exempt status of 501(c)(4) organizations. The proposed regulation could jeopardize the tax-exempt status of many nonprofit organizations and inhibit citizens from exercising the right to freedom of speech.
- A prohibition on funds for the IRS to target groups for regulatory scrutiny based on ideological beliefs.
- A prohibition on funds for the IRS to target individuals for exercising their First Amendment rights.
- A new prohibition on funds to determine church exemptions unless the IRS Commissioner has consented and Congress has been notified.”

Section 116 of the bill more particularly focuses on political campaign activities:

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*None of the funds made available by this Act may be used by the Internal Revenue Service to make a determination that a church, an integrated auxiliary of a church, or a convention or association of churches is not exempt from taxation for participating in, or intervening in, any political campaign on behalf of (or in opposition to) any candidate for public office unless –*

- (1) the Commissioner of Internal Revenue consents to such determination;*
- (2) not later than 30 days after such determination, the Commissioner notifies the Committee on Ways and Means of the House of Representatives and the Committee on Finance of the Senate of such determination; and*
- (3) such determination is effective with respect to the church, integrated auxiliary of a church, or convention or association of churches not earlier than 90 days after the date of the notification under paragraph (2).*

### *Reaction From the Philanthropy Community*

In response to the latest move by House GOP'ers, the president and CEO of the National Council of Nonprofits, [Tim Delaney](#), [issued a statement objecting specifically to Section 116](#).

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*Charitable nonprofits, including houses of worship, and foundations vigorously object to any and all efforts to weaken the protections in tax law that prevent politicians, their operatives, and donors from demanding political endorsements and campaign contributions.*

Delaney's statement links to a letter to the subcommittee by [50 organizations and associations](#) explaining opposition to proposed section 116 and – particularly – the specific language “singling out religious congregations”:

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*By giving houses of worship special treatment in the enforcement of IRS restrictions on intervention in political campaigns, the amendment raises serious concerns under the Establishment Clause of the First Amendment to the U.S. Constitution and undermines religious freedom.*

### **Conclusion**

On July 13, 2017, this bill was approved by the Committee on a vote of 31-21. Of course, given the way this and other legislative matters have proceeded in the 115th Congress, there will certainly be new twists, turns, and surprises.