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The Political Ban: A Timely Recap for 501(c)(3)s, Part Two

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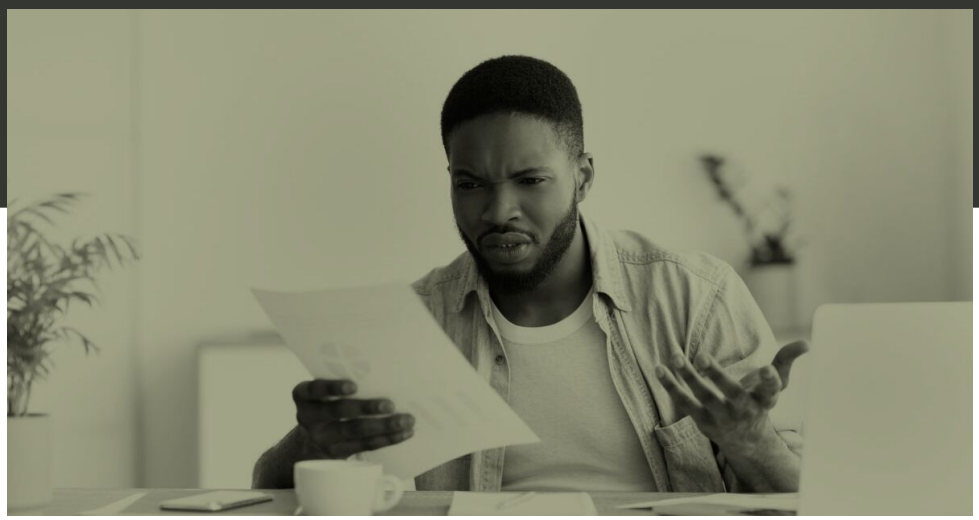

The "Johnson Amendment" – the 501(c)(3) political ban – has been discussed and debated ad nauseum for decades.

This is it:

"*… 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.*"

That's all. The whole enchilada. This snippet of prohibition, this dollop of "don't even think about it," is the final 30 words of section 501(c)(3) of the Internal Revenue. And, of course, this seminal statute that governs the philanthropic sector in the United States and defines which organizations qualify for the best of the tax-exemption categories is – itself – starkly brief at just 131 words.

Most remarkably, except for the addition in 1987 of just four words, it's exactly the same as the original 1954 version.

Entire forests have been consumed to produce the paper devoted to explaining and arguing about it; more recently, untold numbers of computers have given up the ghost from the wear-and-tear caused by defending or opposing the Johnson Amendment. Nevertheless, it persists.

The Political Ban's Statutory Origins

The federal tax laws are a matter of statute enacted from time to time by the Congress of the United States.

That august legislative body knows how to write staggeringly long and complex statutes if it wants to. See, for example, 26 U.S. Code §170. Charitable, etc., contributions and gifts: sufficiently verbose to make the point here, but by no means the wordiest available example.

One benefit of a long statute is detail: what the law means generally and in varied circumstances. There's less for the administrative agencies to do. The first branch of government makes the laws; the second branch's administrative departments and agencies – which, over the years, develop deep subject-matter expertise that senators and representatives ordinarily lack – interpret them, fill in the blanks, and apply them. Sometimes this works out well; sometimes it doesn't – but that's our system.

Here, the legislators of the 83rd Congress in 1954, perhaps channeling Bartleby the Scrivener, apparently preferred not to enact a comprehensive, carefully considered and debated, statute. (More on that below.) That's disturbing on many levels but – more to the point – it creates problems when the organizations governed by 501(c)(3) want to know what this law means and how to apply it to a broad array of facts and situations. It also creates headaches for the Treasury Department and its Internal Revenue Service trying to administer it thoughtfully and fairly as well as for the courts which have been asked over and over again to referee political-campaign ban disputes.

So here we have a 100%, no-exceptions, rule: Don't "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." (The bolded words added in 1987 are irrelevant in figuring out the "legislative intent" of the original 1954 version.)

When we want to pin down the official "meaning" of a particular statute, we turn to the time-tested rules of "statutory construction." The first step – always – is to look "at the plain language of the statute to discover its original intent," applying the "usual and ordinary meanings" of the words.

At first blush, the individual 30 words and collective gist of the Johnson Amendment, the 501(c)(3) political ban, may seem clear. They are not, though: Take the word of the Internal Revenue Service. Over the years, that agency has explained how and why "participate in" – for example – requires some further explanation and has considered whether "intervene in" means something different or is just another way to describe participation. Similarly, neither "political campaign" nor "candidate for public office" has a "plain meaning."

"If after looking at the language of the statute the meaning of the statute remains unclear, courts attempt to ascertain the intent of the legislature by looking at legislative history and other related sources."

And that takes us back to the sad reality and consequences of that smoke-filled back room at the U.S. Capitol in 1954.

No Legislative History on Political Ban

Majority Leader Lyndon B. Johnson introduced the 30-word phrase that has since come to bear his name as an eleventh-hour "floor amendment" which means there was no discussion or debate before the vote. There were no committee deliberations, no amendments or deletions of various

possible versions – no nothing. There is no "legislative history" at all for section 501(c)(3).

Of course, even if there were such a trove of "documents that are produced by Congress as a bill is introduced, studied, and debated," they would be "merely persuasive authority, not mandatory authority." And, of course, "because legislators may intend different things when they vote for a bill, statutory construction is often fairly difficult."

Even more disconcerting than the absence of usable legislative history for section 501(c)(3) is the considerable evidence that LBJ thought the language in his amendment was only a *partial* ban of political activities (along the lines of a statute in 1934 limiting – but not banning – the lobbying activities of charities). And the icing on this rancid cake?: LBJ appears to have concocted this amendment as a personal political vendetta against a rival and that legislator's favorite charity. See *The Political Ban in 501(c)(3): Its Odd History (June 23, 2016).*

Speaking of the 1934 amendment, it's important to note that the federal tax code itself was relatively new at the time. Congress first enacted the federal *income tax* only two decades earlier. The matter of exemptions from this tax on *income* developed thereafter. Before that, though, there were taxes primarily on tariffs, and exemptions were enacted for the benefit of charitable organizations. See *History of 501(c)(3) for Nonprofit* (September 26, 2017) *A History of the Tax-Exempt Sector: An SOI Perspective* (undated IRS publication on the website)

In fact, since before the American Revolution, there have been charitable institutions and associations, and a "common law" developed to deal with issues of exemptions from tariffs as well as whether charities should be allowed to get involved in politics. Specifically, during the early days of the current federal tax code, before the all-important 1954 version, there were discussions about the issue of political activities by these organizations but no definitive conclusions or resolution of this difficult issue.

All of this is relevant under the rules of statutory construction, especially when there is limited legislative history or none at all. The step following examination of a statute's "plain language" and consideration of any "legislative history" is looking at "other related sources" including historical patterns like this.

Why This Summary?

So what's the point of this trip down memory lane in our multi-part recap and summary of the 501(c)(3) political ban?

Now, in the midst of the contentious 2020 primary season leading up to perhaps the most consequential general election in United States history – up and down the ballot and nationwide – philanthropic organizations may find it difficult or even impossible to "just say no" to activities that could possibly collide with this ban.

And the extent and contours of this ban remain far from clear. Even the IRS's best guidance on many points is that an answer depends on a "consideration of all the facts and circumstances." Over the decades, many organizations have litigated the political-campaign activities ban including on the ultimate question of whether the statute is unconstitutionally vague or whether it's unfair because –

as the government acknowledges – it's only selectively enforced.

All of this takes us back to the statute itself: remarkably brief, no legislative history, and perhaps out of step with the realities of an election season that starts the morning after the votes are tallied on the previous one, and in which the outcome of many issues may constitute existential threats to philanthropies and their constituencies.

Conclusion

So what are well-meaning 501(c)(3) organizations supposed to do in these precarious times? That's up next in a few more posts.

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