



February 16, 2017

www.citizen.org

The Devil in the Details

Proposals to “Destroy” or Alter Johnson Amendment
Could Create a New Deluge of Political Spending

Acknowledgments

This report was written by Public Citizen research directors Rick Claypool and Taylor Lincoln in consultation with Emily Peterson-Cassin, coordinator of the Bright Lines Project.

About Public Citizen

Public Citizen is a national non-profit organization with more than 400,000 members and supporters. We represent consumer interests through lobbying, litigation, administrative advocacy, research, and public education on a broad range of issues including consumer rights in the marketplace, product safety, financial regulation, worker safety, safe and affordable health care, campaign finance reform and government ethics, fair trade, climate change, and corporate and government accountability.



PUBLICCITIZEN

Public Citizen's Congress Watch

215 Pennsylvania Ave. S.E

Washington, D.C. 20003

P: 202-546-4996

F: 202-547-7392

<http://www.citizen.org>

© 2017 Public Citizen.

The Johnson Amendment is a 1954 law named after then-Sen. Lyndon B. Johnson that prohibited groups registered under Section 501(c)(3) of the tax code from engaging in activities to influence elections. These groups – which include churches, charities and other religious organizations – may receive tax-deductible contributions. They are not required to disclose their donors.

While 501(c)(3) organizations are free to conduct nonpartisan civic engagement activities and speak out on issues of concern to their membership, the Johnson Amendment prevents them from engaging in elections. The law requires religious organizations and charities to remain above the political fray, committed to education, alleviating poverty, ministering to the spirit, curing disease, and addressing other basic human and social needs. The law also has ensured that Americans' charitable giving will not be channeled into political campaigns and has helped maintain the independence of the charitable and religious sectors. It also has prevented politicians from manipulating these organizations for partisan gain.

In recent years, some churches and other religious organizations have claimed that the Johnson Amendment violates the First Amendment because it prohibits pastors from endorsing candidates or making statements that could be construed as influencing an election. Many of these organizations participate in an annual protest during which pastors deliberately make political pronouncements from the pulpit, then challenge the IRS by mailing the agency recordings of their purported political activities.¹

The law gained national prominence in early February, when President Trump at the National Prayer Breakfast promised to “totally destroy the Johnson Amendment and allow our representatives of faith to speak freely.”²

Critics of the Johnson Amendment have historically fallen into two camps: those who call for full repeal³ and those who advocate for the rule to be “fixed.”⁴

Rep. Walter Jones (R-N.C.) reintroduced legislation on January 3, 2017, to repeal the Johnson Amendment.⁵ In the previous Congress, Jones' proposal attracted only one cosponsor.

Rep. Steve Scalise (R-Ga.) has proposed the “Free Speech Fairness Act,” which appears to take a more modest approach.⁶ The Scalise bill, which attracted 19 cosponsors in the last Congress, would permit 501(c)(3) organizations to make political statements as long as they are “made in the ordinary course of the organization's regular and customary activities” and add no more than “de

¹ <https://www.theatlantic.com/politics/archive/2016/08/how-trump-is-trying-to-put-more-money-in-politics/493823/>

² <https://www.washingtonpost.com/news/acts-of-faith/wp/2017/02/02/trump-said-hell-totally-destroy-the-johnson-amendment-what-is-it-and-why-do-people-care/>

³ See <http://www.washingtontimes.com/news/2013/may/20/repeal-the-johnson-amendment/>

⁴ See <https://adflegal.org/detailspages/blog-details/allianceedge/2017/02/01/5-things-to-know-about-the-new-johnson-amendment-fix>

⁵ <https://www.congress.gov/bill/115th-congress/house-bill/172/>

⁶ <https://www.congress.gov/bill/114th-congress/house-bill/6195>

minimis” incremental costs. Similar legislation has been introduced by Scalise and others this Congress. The Scalise bill’s inclusion of the word “incremental” could permit far more political activity than is implied by its simultaneous use of the term “de minimis.”

To the extent that churches simply want to alter the Johnson Amendment to allow pastors to include messages involving elections in their sermons, there is a better way. The Bright Lines Project, which seeks to clarify IRS regulations governing nonprofit organizations’ political activities, has proposed creating a safe harbor for electioneering speech in personal oral remarks at a meeting that is not broadcast. This solution would provide churches the legal security they have requested without running the risk of enabling 501(c)(3) groups to engage in large-scale political activity or subjecting nonpartisan religious institutions to potential political manipulation. The Bright Lines Project proposal may be found at www.brightlinesproject.org.⁷

Six Reasons to Be Concerned About Proposals to Modify Johnson Amendment

Although Scalise’s bill and many other proposals to alter the Johnson Amendment appear to be modest, there is reason to suspect that these proposals mask an intent to allow churches to become far more involved in politics. Here are some reasons:

1. Many of the groups supporting Scalise’s bill or otherwise objecting to the Johnson Amendment have a particular interest in spending money to influence elections.

A Public Citizen analysis found five groups objecting to the Johnson Amendment have cumulatively reported spending \$24 million to influence elections at the federal, state and local levels since 2006. [See table, next page.]

⁷ <http://www.citizen.org/documents/2014-11-15%20draft%20Regs%20and%20Cover%20FINAL.pdf>

Political Spending by Johnson Amendment Opponents

Group	Spending to Influence Elections (2006-2016)	Evidence of Opposition to Johnson Amendment
National Right to Life Committee (including state chapters)	\$11,663,852	James Bopp is legal counsel. Bopp has testified against the Johnson Amendment; ⁸ filed litigation objecting to the government's enforcement of the Amendment; ⁹ and received a grant from the Alliance for Defending Freedom, which is one of the leading critics of the Amendment. ¹⁰ State affiliate Massachusetts Citizens for Life praised the 2016 Republican platform for calling for repeal of the Johnson Amendment. ¹¹ The national group is on record as opposing numerous laws and proposals to compel disclosure of the funders paying for electioneering activities. ¹²
Susan B. Anthony List	\$4,454,288	Spoke out against Johnson Amendment; ¹³ Has been represented by Bopp.
Focus on the Family	\$4,048,518	Represented by Bopp; supports Scalise bill. ¹⁴
National Organization for Marriage (including California chapter)	\$2,387,147	Supports Johnson Amendment repeal; ¹⁵ Has been represented by Bopp.
Family Research Council (including super PAC)	\$1,496,522	Supports Scalise bill; Has called for repeal of the Johnson Amendment. ¹⁶
Total	\$24,050,327	n/a

Data Source: Public Citizen analysis of federal, state and local spending available via the National Institute on Money in State Politics, <http://bit.ly/2kizsc7>

2. One of the leading opponents of campaign finance laws represents several groups that appear to oppose the Johnson Amendment.

A group's choice of James Bopp Jr. as its representative raises suspicions that it seeks changes to the Johnson Amendment for reasons beyond gaining permission to make an occasional political statement. Bopp has dedicated his career to weakening the campaign finance system, including

⁸ <https://www.gpo.gov/fdsys/pkg/CHRG-107hhrg80331/html/CHRG-107hhrg80331.htm>

⁹ <http://www.hvjt.law/2009/04/bopp-challenges-irs-rules-regarding-political-intervention-by-tax-exempt-501-c-3-and-501-c-4-organizations/>

¹⁰ http://www.nrlc.org/archive/news/2004/NRL09/guidelines_for_political_activi.htm. The Alliance for Defending Freedom was known as the Alliance Defense Fund at the time.

¹¹ <http://www.masscitizensforlife.org/hopes-high-for-pro-life-congress/>

¹² <http://www.nrlc.org/FreeSpeech/>

¹³ Marjorie Dannenfelser, president of Susan B. Anthony List, in a 2016 interview with CNN about Trump and the Johnson Amendment: "I think one thing that's important to mention is that [Donald Trump] brought up the Johnson Amendment, repealing the Johnson Amendment many times during this conversation today. And the Johnson Amendment was a limitation on religious people -- religious people to speak out, pastors, priests. If you have a tax status which is the church tax status, you can't speak out in elections. He advocated repealing that amendment. That is a top priority for anybody who was a religious leader, a religious believer and so it was really important that he said that.

<http://www.cnn.com/TRANSCRIPTS/1606/21/cnnt.02.html>

¹⁴ <http://www.cnsnews.com/news/article/penny-starr/irs-accused-operating-behind-veil-secrecy-probe-99-churches>

¹⁵ Albeit not as strongly as other Christian groups. Brian Brown, NOM's president, wrote in a blog post, "President Trump seems to be focused on fixing the so-called Johnson Amendment that prevents pastors from endorsing candidates and preaching about partisan politics. That's fine as far as it goes, but this is a much smaller concern than protecting actual religious liberty and preventing people from being discriminated against by the government simply because they are pro-marriage, pro-life and live out biblical principles in their daily lives. The Johnson Amendment has never been enforced, not even by President Obama who was openly hostile to religious conservatives, and is far less of a priority."

<http://www.nomblog.com/41263/>

¹⁶ <https://www.youtube.com/watch?v=XaPPWwiBHjk>

spearheading the legal case culminating in the Supreme Court's 2010 decision in *Citizens United v. Federal Election Commission*. In that case, the court threw out campaign finance restrictions on outside groups. (The restrictions on charities discussed in this paper refer to those imposed by tax law, not campaign finance laws.)¹⁷

Bopp currently serves or has served as legal counsel for four of the top five political spenders among the organizations that appear to object to the Johnson Amendment. These are the National Right to Life Committee,¹⁸ Focus on the Family,¹⁹ Susan B. Anthony List²⁰ and the National Organization for Marriage,²¹ which have since 2005 collectively spent more than \$22 million toward influencing elections.²² Bopp has challenged IRS rules on 501(c) political intervention in court;²³ the lawsuits ultimately were dismissed.²⁴ He also gave congressional testimony in 2002 in support of legislation similar to the Scalise bill to loosen IRS restrictions on 501(c)(3) groups, saying, "It is time to stop the IRS and others from using Section 501(c)(3) to silence houses of worship."²⁵

3. A group that is one of the chief advocates for changing the Johnson Amendment is on record as opposing a form of political disclosure that would only apply to certain broadcast messages.

The Alliance for Defending Freedom, which has called the Johnson Amendment "unconstitutional"²⁶ and sponsors the annual protest in which preachers intentionally violate the law on political activities,²⁷ filed an amicus brief in *Citizens United v. Federal Election Commission* focusing on certain political disclosure requirements.²⁸ In that brief, the Alliance objected to a now-defunct requirement that organizations broadcasting messages mentioning candidates in the 60 days before an election disclose the funders of those messages.

That requirement only compelled disclosure for churches if they broadcast radio or television communications mentioning candidates for office.²⁹ The Alliance's brief may suggest that its advocacy for changing the Johnson Amendment is motivated at least in part by a desire to permit churches to broadcast political messages. Such mass media communications, in turn, have the

¹⁷ <http://www.motherjones.com/politics/2011/03/james-bopp-citizens-united>

¹⁸ <http://www.masscitizensforlife.org/hopes-high-for-pro-life-congress/>

¹⁹ <http://www.bopplaw.com/attorney-profiles>

²⁰ <https://www.sba-list.org/newsroom/press-releases/susan-b-anthony-list-wins-appeal-request>

²¹ <http://www.npr.org/2012/02/23/147294511/understanding-the-impact-of-citizens-united>

²² Public Citizen analysis of federal, state and local spending available via the National Institute on Money in State Politics, <http://bit.ly/2kizsc7>.

²³ <http://www.hvjt.law/2009/04/bopp-challenges-irs-rules-regarding-political-intervention-by-tax-exempt-501-c-3-and-501-c-4-organizations/>

²⁴ <http://www.harmoncurran.com/library/BK%20TOE-Circumstances.pdf> ;

<http://www.leagle.com/decision/In%20FCO%202011115091/CHRISTIAN%20COALITION%20OF%20FLORIDA,%20NC.%20v.%20U.S>

²⁵ <https://www.gpo.gov/fdsys/pkg/CHRG-107hrg80331/html/CHRG-107hrg80331.htm>

²⁶ <https://www.adflegal.org/detailspages/blog-details/allianceedge/2016/10/31/the-legal-implications-of-the-johnson-amendment>

²⁷ <http://www.adflegal.org/issues/religious-freedom/church/key-issues/pulpit-freedom-sunday>

²⁸ <http://moritzlaw.osu.edu/electionlaw/litigation/documents/CU-ABrief7.pdf>

²⁹ https://www.law.cornell.edu/background/campaign_finance/bcra_txt.pdf

potential to exert far greater influence over elections than comments from the pulpit that remain within the walls of a church.

4. Interpretations of the Scalise bill suggest that it might be used for extensive, televised political messages.

The Commission on Accountability and Policy for Religious Organizations, a group formed at the behest of Sen. Charles Grassley (R-Iowa), published a report³⁰ on the Johnson Amendment in 2013 suggesting that merely permitting political speech with *de minimis* incremental costs could have far-reaching effects.

In its report, the Commission made recommendations that were very similar to the language now in Scalise's bill. Namely, the report said:

The Commission believes that a communication related to one or more political candidates or campaigns that is made in the ordinary course of a 501(c)(3) organization's regular and customary religious, charitable, educational, scientific, or other exempt purpose activities should not constitute a prohibited activity under Section 501(c)(3), so long as the organization does not incur more than *de minimis* incremental costs with respect to the communication.

But the report's interpretation of hypotheticals suggested that a church might be able to make significant political expenditures without violating the prohibition on *de minimis* incremental expenditures.

For example, the report contained a scenario in which a "Candidate R" would speak before a church and the presiding minister would encourage parishioners to vote for the candidate. Audio and video recordings would then be posted on the church's web site. Because no extra costs would be incurred, the authors wrote, "the communications related to Candidate R's candidacy would be considered no-cost political communications, and would not constitute prohibited participation or intervention in a political campaign."

This example suggests a view that a church could devote an entire service to political topics without violating the prohibition on *de minimis* incremental expenditures as long as it was a regularly scheduled service. This raises the possibility that a pastor with a national television audience of millions of people could legally devote an entire hour to a political topic if the Scalise bill became law.

³⁰ <http://s3.documentcloud.org/documents/756981/report.pdf>

5. The Scalise bill has been endorsed by the National Religious Broadcasters.³¹

The National Religious Broadcasters is a lobbying group founded by televangelist Pat Robertson that “exists to represent the Christian broadcasters’ right to communicate the Gospel of Jesus Christ to a lost and dying world.”³² Churches represented by the National Religious Broadcasters (and other churches) could, if the Scalise bill is passed, shift their messaging to express political advocacy that calls directly for the election or defeat of political candidates.

6. Some Johnson Amendment proposals go much further than merely addressing claims that it unfairly restricts speech in churches.

Similar to Trump’s proposal to “totally destroy” the Johnson Amendment,³³ the 2016 Republican Platform³⁴ calls for the “repeal” of the Johnson Amendment as follows:

Republicans believe the federal government, specifically the IRS, is constitutionally prohibited from policing or censoring speech based on religious convictions or beliefs, and therefore we urge the repeal of the Johnson Amendment.

Both Trump’s pledge and the Republican platform statement contain contradictions. They are premised on concerns about regulation of speech by religious entities but they advocate a remedy that would apply to all 501(c)(3) groups, a far broader scope.

Conclusion

Any change to the law that allows 501(c)(3) groups to engage in substantial political activities would significantly weaken what’s left of our campaign finance system and threaten the independence and reputation of the charitable and religious sectors as a whole. The funders behind spending by 501(c)(3) groups would not be disclosed. This would exacerbate the problem of political “dark money” that has grown markedly since the Supreme Court’s decision in *Citizens United*, and would leave the public to question whether their charitable donations were being used for their intended purpose rather than partisan politics.

Furthermore, such a change would enable 501(c)(3) groups to use tax-deductible contributions to influence elections. This is one line that has never been crossed, even as the courts have steadily eroded campaign finance rules.

As this report shows, even the ostensibly modest change to the Johnson Amendment called for in the Scalise bill could permit much more substantial spending than the language of the law suggests. The broader proposals to eliminate the amendment altogether, meanwhile, would essentially

³¹ http://nrb.org/news-room/press_center/nrb-endorses-free-speech-fairness-act-repeal-infamous-johnson-amendment/?ccm_paging_p_b23209=39

³² <http://nrb.org/about>

³³ <https://www.washingtonpost.com/news/acts-of-faith/wp/2017/02/02/trump-said-hell-totally-destroy-the-johnson-amendment-what-is-it-and-why-do-people-care/>

³⁴ 2016 Republican Platform, page 11, via <https://gop.com/platform/> James Bopp Jr. is listed on page 56 among the platform committee members.

permit charities to act as super PACs, with the enhanced powers to receive tax-deductible contributions and keep their donors secret.

Moving from the current, unclear, regulations governing political activity for nonprofits to a system with clear lines and safe harbors (such as recommended by the Bright Lines Project) would address some of the critiques leveled at the Johnson Amendment while preventing abuses that lead to the proliferation of undisclosed money in our political system. However, the prohibition on 501(c)(3) partisanship must be left in place to protect against further erosion of our campaign finance system and to protect the integrity of our charitable and religious sectors.