

# Baptists and the Johnson Amendment



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*On May 4, 2017, President Donald Trump signed an executive order titled "Promoting Free Speech and Religious Liberty" that directed the Department of Treasury to not "take any adverse action against any individual, house of worship, or other religious organization on the basis that such individual or organization speaks or has spoken about moral or political issues from a religious perspective."<sup>1</sup>*

The target of Trump's action was the so-called Johnson Amendment, the 1954 Internal Revenue Service tax code amendment that banned churches and other tax-exempt organizations from "directly or indirectly participating in, or intervening in," political campaigns. Seeking to fulfill a campaign promise to "totally destroy" the Johnson Amendment, Trump signed the executive order in a Rose Garden ceremony surrounded by Christian Right and other conservative evangelical political supporters. "For too long the federal government has used the power of the state as a weapon against people of faith," he declared during the ceremony, "bullying and even punishing Americans for following their religious beliefs."<sup>2</sup>

Not surprisingly, responses to the executive order were mixed. Some Christian Right figures praised the order, including Ralph Reed, chairman of the Faith and Freedom Coalition, who declared that a "sword of Damocles that has hung over the faith community for decades has been removed."<sup>3</sup> Tony Perkins, president of the Family Research Council, asserted that "no

longer will the IRS muzzle the speech of pastors and non-profit organizations. . . . The open season on Christians and other people of faith is coming to a close in America."<sup>4</sup> Yet other conservative evangelicals' assessments of the executive order were tepid, if not critical. Noting that the final draft of the executive order had been watered down, Gregory S. Baylor of the Alliance Defending Freedom, the leading organization committed to overturning the Johnson Amendment, described it as "disappointingly vague" and expressed hope that the president would lobby Congress to make more substantive changes to the tax code. Other religious figures criticized Trump's action and spoke in favor of the Johnson Amendment, arguing that it protected churches from being politicized. "For decades the Johnson Amendment has prevented houses of worship from being turned into partisan political tools," Rabbi Jack Moline, president of the Interfaith Alliance, declared: "A majority of clergy—and Americans—support the status quo and oppose political endorsements from the pulpit."<sup>5</sup>

Baptist responses to the executive order were mixed also. Robert Jeffress, pastor of First Baptist Church in Dallas, Texas, and one of the leading conservative evangelical political supporters of Donald Trump, celebrated that "today ends the sixty-year-old assault by government on religious liberty."<sup>6</sup> Several Southern Baptist leaders, including former SBC presidents Ronnie Floyd and Jack Graham, attended the ceremony. Graham led a prayer prior to the event and stood behind Trump as the president signed the executive order.<sup>7</sup> Russell Moore, head of the Ethics and Religious Liberty Commission of the SBC, tweeted "Grateful for Executive Order's affirmation of the need to protect religious freedom."<sup>8</sup> In contrast, moderate and progressive Baptists criticized Trump's action. Suzii Paynter, then executive coordinator of the Cooperative Baptist Fellowship, responded that "partisan politics have no place in our pulpits," while Amanda Tyler, executive director of the Baptist Joint Committee for Religious Liberty, warned that the executive order was "further evidence that President Trump wants churches to be vehicles for political campaigns."<sup>9</sup> In response to Trump's promise to kill the Johnson Amendment, Tyler and the Baptist Joint Committee mobilized a coalition of nearly one hundred churches to urge Congress not to repeal the amendment. These included the Alliance of Baptists, the American Baptist Churches USA, the Cooperative Baptist Fellowship and the National Baptist Convention.<sup>10</sup>

Republican members of Congress also shared President Trump's opposition to the Johnson Amendment. In late 2017 the president's allies introduced an amendment to the House of Representative's tax reform bill that would effectively lead to the Johnson Amendment's repeal by allowing churches and other nonprofits to endorse candidates to public office without losing their tax-exempt status. Despite support from a number of prominent conservative evangelical clergy as well as lawmakers, the repeal amendment was dropped during the reconciliation process between the House and Senate versions of the tax bill.<sup>11</sup>

The contemporary debate over the Johnson Amendment raises a number of compelling historical and constitutional questions about Baptist views on tax exemption regulations and the First Amendment rights of churches and their pastors. This article examines the historical context of the Johnson Amendment, responses of Baptists to its proscriptions, and the current debate that has ensued among Baptists about its constitutionality.

### **Origins of the Johnson Amendment**

Tax exemption of churches has a long history in the West and is a well-established tradition in the United States.<sup>12</sup> The U.S. Supreme Court upheld the constitutionality of tax exemption of church property in the 1970 decision *Walz v. Tax Commission*.<sup>13</sup> Rather than creating a "special burden" that violated the Free Exercise Clause of the First Amendment or a "special benefit" in violation of the Establishment Clause, tax exemption of churches and other non-profit charitable and educational organizations allowed for a "benevolent neutrality" between church and state, according to the Court. Moreover, the Court determined that tax exemption was not a "subsidy" to churches, but rather "indirect support" that ensured the involvement between church and state would be "minimal and remote."<sup>14</sup> Currently, according to section 501c3 of the Internal Revenue Code, religious, social, educational, literary, and charitable non-profit organizations are not only exempted from taxation, but also individuals who donate to these organizations may deduct these contributions from their income taxes. Two qualifications are noted, however: Churches may not engage in "substantial" lobbying efforts nor engage in political campaign activities.<sup>15</sup> According to Dean M. Kelley, however, the legislative history behind these restrictions reflects a desire

to regulate "sham" organizations that were really a 'front' for lobbying on behalf of 'wealthy donors'.<sup>16</sup>

The origin of the lobbying restriction can be traced back to 1934 when Congress amended the tax code to stipulate that a church's tax-exempt status could be revoked if a "substantial" part of its activities was to engage in "propaganda, or otherwise attempting, to influence legislation." Senator David Reed of Pennsylvania, who had been facing opposition to his veterans' benefits bill by a non-profit organization called the National Economy League, introduced the lobbying amendment. Presumably, the lobbying amendment's purpose was to "silence" the non-profit organization.<sup>17</sup>

McCarthyism and Texas politics set the stage for the 1954 Johnson Amendment restricting partisan electioneering by churches. Texas Senator Lyndon B. Johnson was seeking a second term in 1954 when two right-wing and anti-communist organizations supported his opponent Dudley Dougherty.

Facts Forum, which enjoyed the patronage of Texas oilman H.L. Hunt, produced anti-communist radio and television broadcasts and published a newsletter that had a growing circulation.<sup>18</sup> The Committee for Constitutional Government, an organization founded by newspaper magnate Frank Gannett, since the 1940s had become increasingly committed to combatting communism. Leaders of these two organizations saw Democratic Party loyalists, such as Johnson, as too soft on communism and lent their support to Dougherty. As a result, Lyndon Johnson sought not only a way to assist his own campaign, but also to preserve the Texas Democratic Party from its more rabidly anti-communist wing. As James Davidson characterized the historical context: "If Johnson could put an end to Facts Forum's partisan support for (Joseph McCarthy,) and stifle any involvement in his own race against Dougherty, he could challenge the political right on a national level, improve loyal Democrats' chances in the Texas primary, and serve his own political interests all at the same time."<sup>19</sup> Consequently, Johnson and his staff began to make inquiries to both the Senate Democratic Policy Committee and the IRS about whether the activities of these groups violated their tax-exempt status. Ultimately, on July 2, 1954, Johnson introduced an amendment to a tax revision bill on the Senate floor that "seeks to extend the provisions of section 501 of the House bill, denying tax-exempt status to not only those people who influence legislation but also to those who intervene

in any political campaign on behalf of any candidate for any public office."<sup>20</sup> Johnson's amendment was approved by a voice vote and no discussion.<sup>21</sup>

The historical record indicates that partisan politics, rather than church electioneering, was the main concern of Johnson when introducing the amendment. This has led some scholars to argue that the Johnson Amendment has nothing to do with churches and their political activities. Indeed, Johnson's chief of staff, George Reedy, expressed that he was "confident that Johnson would never have sought restrictions on religious organizations."<sup>22</sup> Nonetheless, churches are among the non-profit organizations impacted by the amendment. In light of this, how did Baptists respond to this development?

### **Baptist Responses to the Johnson Amendment**

An examination of Baptist news publications, minutes of board meetings of the Baptist Joint Committee, and other Baptist literature reveals an extraordinary silence on the Johnson Amendment. Indeed, little, if anything, was discussed or debated about this provision until recently. To be sure, Baptist organizations, such as the Baptist Joint Committee, gave regular attention to issues of churches and tax policy, but most of their literature focused on questions surrounding the constitutional debate over tax exemption generally, the taxation of "integrated auxiliaries," what constituted "substantial" involvement in lobbying, and the challenges of defining churches and religion for tax purposes.<sup>23</sup> Otherwise, no sustained attention was given to the tax implications of partisan political engagement by churches. There are at least two explanations for this.

First, since the Johnson Amendment was dispensed with so quickly and with no debate, it could be that few people outside of Congress were aware of its passage. Indeed, the Johnson Amendment received limited public attention. It is not mentioned in any of the major Johnson biographies and seemed to not draw any significant attention from the media at the time. As Kevin Bakeraug has argued: "This was considered so uncontroversial at the time that no record of what Johnson was thinking or precisely how he got this clause attached to the tax code seems to have survived."<sup>24</sup>

Second, the Johnson Amendment merely codified what was likely a broad consensus among Baptist pastors and denominational leaders at the time that involving churches in elections or other partisan political activities was inappropriate.

There are certainly exceptions to this tradition. Baptist angst over the prospect of a Catholic president in 1928 and 1960 was widespread and, no doubt, the subject of a number of sermons in Baptist pulpits. Not surprisingly, the most hyperbolic opposition to Al Smith and John F. Kennedy came from the more firebrand fundamentalists of the denomination such as J. Frank Norris and W.A. Criswell.

Criswell's sermon "Religious Freedom, the Church, the State, and Senator Kennedy" received widespread attention when H.L. Hunt funded the printing and distribution of more than 200,000 copies of a pamphlet that included excerpts of the sermon. While not explicitly endorsing Nixon in 1960, Criswell's sermon was a clear call to oppose the Catholic Kennedy's candidacy. Fearing Roman Catholic influence in the White House, Criswell declared: "If Kennedy wins, with strong emphasis on separation of church and state, the door is open for another Catholic leader who gives the Pope his Ambassador, the church schools state support, and finally, recognition of one church above America."<sup>25</sup> Moreover, the Southern Baptist Convention passed a resolution in 1960 declaring that "when a public official is inescapably bound by the dogma and demands of his church, he cannot consistently separate himself from these. This is especially true when that church maintains a position in open conflict with our established constitutional patterns of life, specifically . . . separation of church and state."<sup>26</sup> Despite these examples of Baptists violating the spirit, if not the letter, of the Johnson Amendment, these were exceptions to a Baptist tradition of avoiding partisan proclamations from the pulpit.

So why all of the debate today, especially considering only one church has lost its tax-exempt status due to partisan electioneering since the 1954 Johnson Amendment was added to the tax code? The debate over the Johnson Amendment is, in part, a byproduct of the political mobilization of conservative evangelicals that largely coincided with the election of President Ronald Reagan in 1980. Joined by a number of conservative and fundamentalist Baptist leaders, the Christian Right found its origins in the anti-integration movements of the 1960s and 70s and later mobilized around opposition to abortion, gay rights, and other issues of concern for social conservatives. With the growing political influence of the Christian Right, complaints were inevitably raised that churches and pastors were engaging in partisan electioneering.<sup>27</sup>

Conservative Southern Baptists who sought to align the Convention with Republican politics were more likely to become politically active during this period. W.A. Criswell prayed at the Republican National Convention in 1984, SBC leaders enjoyed increased access to the White House, and Republican presidents addressed the annual SBC meetings. Not all partisan activities were on the Right, however. When running for the Democratic presidential nomination in 1984, Baptist minister and civil rights activist, Jesse Jackson, mobilized African-American churches to take up collections to support his campaign.<sup>28</sup> None of these events led to a church's tax-exempt status being revoked, however. In fact, despite scores of complaints and some investigations launched, the IRS has revoked a church's tax-exempt status only one time. On January 9, 1995, the Church at Pierce Creek in New York had its tax exemption revoked due to a full-page ad it placed in *USA Today* and the *Washington Post* that criticized President Clinton's position on moral issues and declared "How can we vote for Bill Clinton?" In fact, churches were less likely than other religious nonprofits to have their tax-exempt status revoked due to violations of the IRS Code. In 1964 religious broadcaster Christian Echoes National Ministry Inc. lost its tax-exempt status due to partisan political activities. Thirty-five years later, the Christian Coalition found its tax-exempt status denied due to the IRS's determination that its voter guides were biased in favor of Republican candidates.<sup>29</sup>

Nonetheless, when partisan political activity by churches rose quickly in the early 2000s, the IRS sought to ramp up efforts to educate churches and other nonprofits about the tax code restrictions. Partisan political activity of churches was also catalogued by the watchdog organization, Americans United for Separation of Church and State, which reported that "more potential violations occurred in 2004 than in the preceding five years combined."<sup>30</sup> Not only were more pastors endorsing candidates, but churches also were hosting candidates and providing candidates with their membership lists. Some of these actions were orchestrated by the Bush/Cheney presidential campaign in 2004 that called on volunteers to send church directories to the campaign headquarters, hold voter registration drives, distribute voter guides, and hold campaign events.<sup>31</sup>

With the escalation of partisan politics combined with the perceived high stakes of the culture wars, a growing number of Christian Right pastors and politicians began to challenge the Johnson Amendment. Arguing that the tax regulation of nonprofits violated both the free speech and free exercise

clauses of the First Amendment, conservatives sought to protect church political activities through legislative efforts. This included the attempt to attach a "Safe Harbor Bill," protecting churches' political activities, to a larger budget bill during the 2004 election season.<sup>32</sup> Richard Land, head of the Southern Baptist Convention's Ethics and Religious Liberty Commission, opposed the bill because he feared its verbiage might lead to greater monitoring of churches by the IRS. Despite this concern, Land went on to criticize the Johnson Amendment for having a "chilling effect on churches and preachers."<sup>33</sup> "Today, many congregations and church leaders have been completely silenced because of their fear the IRS will rescind their tax exemption," Land concluded. "While we would counsel churches not to endorse candidates, and to exercise caution in engaging in campaign speech, . . . we believe that it is the churches, not the government, that should decide these things."<sup>34</sup>

The 2000s also saw Congressional Representative Walter B. Jones of North Carolina introduce several unsuccessful bills that sought to repeal the Johnson Amendment. Senator James Inhofe of Oklahoma introduced the Religious Freedom Act of 2006 that likewise sought to protect the "free speech rights of churches."<sup>35</sup> And in 2007 Wiley Drake, pastor of First Southern Baptist Church of Buena Park in California, announced his endorsement of Mike Huckabee for president.<sup>36</sup> The most direct and widely orchestrated challenge to the Johnson Amendment has come from the Alliance Defense Fund, an organization formed by a group of Christian Right leaders to wage legal battles on behalf of religious freedom. During the 2008 presidential election the Alliance organized a so-called "Pulpit Freedom Sunday" in which approximately three dozen pastors across the nation delivered partisan political sermons. Baptists were among those who participated, including Pastor Jody Hice of Bethlehem First Baptist Church in Georgia. In his sermon Hice declared that Barack Obama was "on the wrong side of the Bible" on the moral issues of the day. "I am not trying to put forth John McCain as the embodiment of scriptural authority," he continued. "Nonetheless, he is who I'll be voting for and who I urge you to vote for."<sup>37</sup>

Pulpit Freedom Sundays have continued to grow, with the Alliance claiming more than two thousand participants in 2016. Southern Baptist minister and Republican presidential candidate Mike Huckabee endorsed the Pulpit Freedom Project in 2012, and in February of 2017 Oklahoma Senator James Lankford, also an ordained Southern Baptist minister, introduced to the Senate the "Free Speech Fairness Act," a bill designed to give



“nonprofits and houses of worship the freedom to speak about government or electoral activity without the threat of retribution from the Internal Revenue Service.”<sup>38</sup> Thus, a concerted effort has been made by some conservative Southern Baptists and other members of the Christian Right to challenge, both legislatively and in the courts, the constitutionality of the 1954 Johnson Amendment.

While some of the key opponents of the Johnson Amendment are Baptists, so are many of its supporters. Citing Pew Research Center and LifeWay Research surveys indicating a large majority of evangelicals oppose churches engaging in partisan political activity, the Baptist Joint Committee was one of the leading organizations fighting to preserve the Johnson Amendment. Warning that the repeal of the Johnson Amendment could threaten the integrity of houses of worship as well as their independent and prophetic voices, the BJC, in partnership with Americans United for Separation of Church and State, led an initiative called “Faith Voices” that secured more than four thousand signatures of faith leaders opposing the Johnson Amendment’s repeal.<sup>39</sup> And when efforts in Congress to repeal the Johnson Amendment failed, the BJC’s Amanda Tyler penned, along with Rabbi David Saperstein, a *Washington Post* editorial defending the IRS rule and celebrating the fact that President Trump had not been able to fulfill his promise to “totally destroy” the Johnson Amendment.<sup>40</sup> “Religious leaders have been able to speak with moral authority on the great issues of their day,” Tyler and Saperstein argued, “precisely because they have operated independently from government and its officials.”<sup>41</sup>

### **The Constitutional Debate**

The constitutional debate over the Johnson Amendment raises a number of First Amendment issues. Opponents of the Johnson Amendment argue that the restriction fundamentally violates the free speech rights of churches and their pastors. To condition the tax exemption on their giving up the right to political expression is deeply troubling to those who see this as little more than a political “gag order” on pastors. Opponents have been further emboldened by the 2010 *Citizens United* Supreme Court decisions upholding the free speech rights of corporations. If corporations’ political speech is protected by the First Amendment, then why not churches? Defenders argue that the Johnson Amendment has

a narrow proscription—the endorsement of or opposition to particular candidates. Pastors can and have discussed moral, political, economic, and social issues from the pulpit without any threat from the IRS. As one commentator expressed the argument,

We make no apologies for the church's involvement in the civil rights movements, the pro-life movement, or the defense of immigrants and refugees. But political engagement and partisan knife fights are different things. Repealing the Johnson amendment would inevitably tarnish the church by subjecting it even more to the temptation to politicize the gospel.<sup>42</sup>

Moreover, defenders argue that if pastors feel particularly compelled to endorse candidates, they are free to do so as private citizens as opposed to speaking on behalf of their congregations. There is a real concern among defenders of the Johnson Amendment that churches will become political action committees, funneling tax-free tithes to the parties and candidates of their choice. Finally, the defenders point out that pastors and churches may also engage in unlimited partisan political activities if they are willing to forego their tax-exempt status.<sup>43</sup>

Opponents of the Johnson Amendment contend that it creates a constitutional conundrum for free exercise of religion reasons as well. What if one's religious conscience and prophetic calling leads one to speak against or for a candidate? While the opponents recognize that the amendment doesn't necessarily ban general political and moral advocacy, they argue that the threat of the loss of tax exemption has had a "chilling effect" on pastors seeking to play their prophetic role. There is a fine line, they argue, between "issue advocacy" that is acceptable and "campaigning intervention" that is prohibited. Since there is no "bright line" test for deterring violations, they argue, "the predictable outcome . . . has been massive self-censorship among churches and pastors."<sup>44</sup>

Unconvinced, proponents argue that this speech is not prohibited by the Johnson Amendment, that the IRS has not aggressively investigated or prosecuted the amendment, and that the IRS provisions play an important role in reinforcing the separation of church and state. Partisan politicking would otherwise lead to politicized churches that would have to face continual monitoring by the state to make sure they were not becoming merely

political action committees for a politician or political parties. Such entanglement between church and state would inevitably encourage Establishment Clause challenges.<sup>45</sup>

### Conclusion

Not surprisingly, the contemporary debate among Baptists over the Johnson Amendment largely falls along theological and political lines. Some conservative Southern Baptists, especially those most identified with the Christian Right, oppose the Johnson Amendment while moderate and progressive Baptists largely support retaining what they see as an important safeguard against politicized churches. Some of the debate over the Johnson Amendment stems from its original purpose to limit the political activities of far-right political organizations. Largely ignored for much of its history, the amendment became a lightning rod of contention in more recent years as conservative evangelicals and the Baptists associated with the Christian Right employed their congregations as foot soldiers in their battle to "win America back to God."

In the end, Donald Trump's executive order merely asserted that churches can do what they have always been able to do—speak out on the moral, political, and economic issues of the day. Any substantive change to the Johnson Amendment would require legislative action, and those efforts have been unsuccessful thus far. Moreover, the claim that churches' First Amendment freedoms have been curtailed by the Johnson Amendment is contradicted by the increased politicization of conservative evangelicals that has led to virtually no sanctions by the IRS.

At the same time, moderate and progressive Baptists would do well not to dismiss all of the First Amendment arguments raised by their conservative counterparts. The Baptist Joint Committee and other organizations raised many of these same arguments when challenging the vagueness of the tax code's "substantial lobbying" restriction on churches and religious institutions thirty years ago. The lack of enforcement by the IRS does not necessarily negate the argument that some prophetic pronouncements from the pulpit could be interpreted as a partisan activity. On balance, however, the Johnson Amendment remains a prudent protection for churches that might otherwise be manipulated by a narrow partisan agenda.

## Notes

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20 *Ibid.*, 18.

21 *Ibid.*

22 *Ibid.*

23 See, for example, these sources from the Baptist Joint Committee on Public Affairs, Washington, DC: "Study Papers on the Churches and American Tax Policies: 4th Annual Religious Liberty Conference," 1960; John W. Baker, "The Court on Church Tax Exemption: An Expanded Rationale for Church-State Relations," 1970; and "Taxation and the Free Exercise of Religion: Papers and Proceedings of the Sixteenth Religious Liberty Conference," 1977.

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