foreign-owned businesses would seem to require stronger enforcement by the Trump administration of Obama administration policies, rather than enacting an entirely new tax.

A Border Adjustment

Much of Trump's criticism of how other countries are taxing American products appears to be directed at border-adjusted VATs. In his February 28 speech to Congress, he said that "when we ship products out of America, many other countries make us pay high tariffs and taxes — but when foreign companies ship their products into America, we charge them almost nothing."

Trump's criticism echoes language in the House blueprint, which argued for a border-adjusted tax by saying that the U.S. tax system results in a "self-imposed unilateral penalty on U.S. exports and a self-imposed unilateral subsidy for U.S. imports."

But the problem with associating Trump's reciprocal tax with the House's destination-based cash flow tax proposal is that Trump has steadfastly refused to endorse the latter. Although he has moved away from harsh criticism of it — such as when he originally deemed it "too complicated" — he has never praised it. Senior administration officials have largely followed that approach.

A VAT?

There is one type of tax that could be characterized as achieving reciprocity between the U.S. tax system and that of other countries. If the United States were to enact a VAT, it would have precisely the same type of incentives for exports and penalties for imports that other countries do.

Republican lawmakers, who emphasize that the tax proposed by the blueprint is economically equivalent to a VAT, also emphasize that the tax they are proposing is not a VAT. That is because a VAT is politically unpalatable, especially among conservatives.

But for Trump, political orthodoxies hold little sway. The constraints of proposing a border-adjusted VAT may be less restrictive for him than for many other lawmakers. Supporting a VAT could also give him the leeway to reduce corporate and individual income tax rates as promised during his campaign.

If Trump really wants a reciprocal tax, there is a roadmap — followed by more than 140 other countries — for how to enact one. And given that most other countries have a VAT and that it is specifically endorsed by the WTO, enacting one would not prompt the same concerns about a trade war that other types of reciprocal taxes could.

For the United States, a reciprocal tax could well best be defined as a VAT. ■

TAX HISTORY

The Political Origins of the Ban On Charities' Political Activity

by Joseph J. Thorndike — joseph.thorndike@taxanalysts.org

Last month President Trump promised to "totally destroy" the Johnson Amendment, a 63-year-old IRC provision that prohibits charities from endorsing or opposing political candidates. More recently, House Ways and Means Committee Chair Kevin Brady, R-Texas, made a similar, if less rhetorically dramatic, promise to repeal the law.

The Johnson Amendment, named for its legislative champion, then-Sen. Lyndon Johnson, has a two-part origin story. As Philip Hackney and Brian Mittendorf observe in an article for *The Conversation*, the amendment "arose from a long history of religious leaders engaging in political speech." The authors note this history includes high points such as the abolitionist movement, as well as low ones, such as the anti-Catholic electioneering that surrounded Al Smith's 1928 campaign for president.

In addition to this broad historical context, however, the Johnson Amendment has a more specific origin. The provision, while rooted in long-standing worries about the delicate relationship between charity and politics, was the immediate legislative product of a classic political feud.

Let's consider the dirty politics first.

Johnson's Vendetta

The tax world remembers 1954 as the Year of the Great Codification, but for Johnson, it was just another reelection year. Of course, for a master politician like Johnson, no campaign was "just" anything: It was a battle for survival.

In the midst of his campaign for the Democratic Senate nomination — the only contest that mattered back when Texas was still a deep blue state — Johnson received a note from J.R. Parten, board chair of the Federal Reserve Bank of Dallas. Parten was disturbed by a fundraising letter he had received from the Committee for Constitutional Government (CCG), a tax-exempt organization.

As legal scholar Patrick L. O'Daniel made clear in a detailed history of the Johnson Amendment's legislative origins, the CCG letter underscored the deductibility of contributions to the group and characterized subscription fees for its magazine, *The Spotlight*, as a "legitimate corporate expense."

But Parten drew Johnson's attention to a particular story in the magazine. "The enclosed issue of *Spotlight* presents what is entitled the 'Texas Story' by Willis Ballinger, and this article devotes one and

a half full pages to a violent attack on you, and for the clear purpose of advancing the candidacy of Dudley T. Dougherty, your opponent in the Democratic Primary in Texas.''

''Since when did it become legal and legitimate to expend corporate funds for political purposes?'' Parten asked Johnson. ''I wonder if Mr. Gerard [the CCG trustee who wrote the fundraising letter] did not mean to convey the idea that such contributions may be considered both 'legitimate corporate expense' and income tax exempt.''

> ***'I myself am wondering whether contributions to an organization so actively engaged in politics can be classed as a legitimate corporate expense,' Johnson wrote.***

Johnson thanked Parten for his letter and promised that he would investigate the matter. ''I myself am wondering whether contributions to an organization so actively engaged in politics can be classed as a legitimate corporate expense and I am having this question explored by experts,'' the senator wrote.

Johnson's experts concluded that the CCG had violated Texas election as well as federal tax laws. House Democratic Whip John McCormack, one of Johnson's experts, wrote to the IRS commissioner at the time, T. Coleman Andrews: ''As a member of the House Ways and Means Committee for many years, this document strikes me as both amusing and shocking. I cannot recall any other similar flagrant engagement in political affairs by a tax-exempt organization.''

Slightly more than a month after Parten wrote his letter, Johnson offered the amendment that would soon bear his name. Attached to the pending Revenue Act of 1954, Johnson's provision was designed to broaden existing restrictions on charity lobbying to include any sort of intervention in political campaigns. As Johnson explained to his colleagues:

> This amendment 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. I have discussed the matter with the chairman of the committee, the minority ranking member of the committee, and several other members of the committee, and I understand that the amendment is acceptable to them. I hope the chairman will take it to conference, and that it will be included in the final bill which Congress passes.

And that was pretty much that. Neither Johnson nor any of his allies had much more to say on the subject, and the amendment passed gently into law.

Roger Colinvaux observed in a 2012 article on charities and their political activity that the absence of heated debate around the Johnson Amendment — or any real debate at all — makes the episode look like an exercise in raw politics. ''The Rule's abrupt passage leads many to conclude that its rationale was mostly political,'' he wrote. ''Senator Johnson was attacked by a charity during his reelection campaign and used the power of his office to change the law to prohibit such attacks.''

That assessment is accurate, as far as it goes. But as Colinvaux noted, following legal scholar Ann Murphy, the full story behind the amendment is more complex. To use Murphy's words: ''Although it has been claimed that then-Senator Lyndon Baines Johnson proposed the provision as a vendetta against a political opponent, the facts show a bit more complicated and far less sinister motive.''

Uncontroversial Innovation

The Johnson Amendment is best viewed as part of a larger — and much longer — debate about charities and their political activity. Conveniently, both Murphy and Colinvaux (as well as other scholars) have chronicled this history at length.

When Johnson offered his provision, Congress was already in the midst of extensive hearings exploring the nexus between politics and charity. In 1952 the House established a panel to investigate whether charities were ''using their resources for purposes other than the purposes for which they were established,'' with a special focus on political activity. Two years later, the House convened a follow-up panel, known as the Reece Committee, and gave it clear marching orders:

> The Committee is authorized and directed to conduct a full and complete investigation and study of educational and philanthropic foundations and other comparable organizations which are exempt from Federal income taxation to determine if any foundations and organizations are using their resources for purposes other than the purposes for which they were established, and especially to determine which such foundations and organizations are using their resources for un-American and subversive activities; for political purposes; propaganda; or attempts to influence legislation.

The Reece Committee held a long series of hearings, the last of which was held on the very same day that Johnson introduced his soon-to-be-famous amendment. The committee's final report makes clear that Johnson was hardly alone in seeking new limits on the political activity of exempt organizations.

> It is the opinion of this Committee that the wording of the tax law regarding the prohibition of political activity should be carefully re-examined. We recognize that it is extremely difficult to draw the line between what should be permissible and what should not. Nevertheless, the present rule, as interpreted by the courts, permits far too much license. While further study may be indicated, we are inclined to support the suggestion that the limiting conditions of the present statute be dropped — those which restrict to the prohibition of political activity "to influence legislation" and those which condemn only if a "substantial" part of the foundation's funds are so used.

At issue for the Reece Committee were existing restrictions on lobbying by charities. Adopted in 1934, these limits did not specifically bar campaign intervention (or other forms of non-lobbying political activity). Moreover, the 1934 rules actually allowed some limited amount of lobbying by exempt organizations, as long as it was not "substantial."

"These restrictions make the entire prohibition meaningless," the committee concluded. "We advocate the complete exclusion of political activity, leaving it to the courts to apply the maxim of *de minimis non curat lex*." The panel conceded that it might be hard to consistently identify political activity, but it was unswayed by such worries. "Whatever the difficulties which foundations may face in determining when a proposed activity may have political implications, we cannot see any reason why any public funds should be used when any political impact may result," the panel wrote.

The conclusions offered by the Reece Committee were only the latest installment in a long-running debate about charity and politics. Stretching back to the early days of the modern income tax (or even earlier, depending on where you draw your lines of historical demarcation), this debate reflected persistent concern about the complex relationship between charitable action and political activity.

But the Reece Committee's conclusions, made almost simultaneously with Johnson's amendment, provide crucial context for the latter. Colinvaux observed in his history of the 1954 legislation that "after months of hearings and agitation, the Reece Committee expressed the exact verdict reached by Senator Johnson, and, in turn, Congress: that politics and charity are incompatible."

> ***'The Reece Committee expressed the exact verdict reached by Senator Johnson, and, in turn, Congress: that politics and charity are incompatible,' Colinvaux said.***

Murphy makes a similar point, emphasizing the bipartisan appeal that new restrictions held in 1954: "Against this backdrop, when Senator Johnson proposed his amendment on June 2, 1954, it is not surprising that it was adopted verbatim without hearings or testimony. Both sides of the political fence were disturbed by the potential of non-profit groups to wield political power."

Sympathetic Churches

Antipathy toward the Johnson Amendment, as well as other restrictions on political activity by tax-exempt organizations, is hardly surprising. It tends to come into sharpest focus around the subject of churches, and indeed, politicians have periodically tried to relax the rules as applied to religious organizations.

Indeed, even some members of the Reece Committee were willing to give churches a pass. "The right of a minister, priest or rabbi to engage in political activity is clear enough," declared the panel's three Republican members in their majority report.

Given the prominence of religion in American public life, efforts to liberalize political restrictions on exempt organizations, and especially for churches, seem likely to continue. But as Hackney and Mittendorf pointed out in their article for *The Conversation*, wholesale repeal of the Johnson Amendment would have broad ramifications. "Since it applies to all charities, any attempt to 'destroy' the amendment would affect the behavior of more than just pastors and priests. Schools, hospitals, addiction centers, food banks and other charities all could then advocate for or against candidates to some extent without losing their charitable status."

Even if Trump (or his allies in Congress) tries to draft a limited carveout for churches, the danger to the tax system — and to charities — remains real. "An unintended consequence would be to increase the need for the IRS to answer the question of what constitutes a church," Hackney and Mittendorf observe. "This would almost certainly increase the flow of groups seeking church status. Besides forcing the IRS to answer that difficult question —

what's a church — it may also undermine public perceptions of churches more broadly."

Notably, while some churches and other nonprofits are eager to see the Johnson Amendment repealed, others are worried that "blurring the lines between goals intended to serve the general public and those aimed at special interests would undermine public trust in charities and ultimately even put the charitable deduction at risk."

> ***'Since it applies to all charities, any attempt to "destroy" the amendment would affect the behavior of more than just pastors and priests,' Hackney and Mittendorf wrote.***

The complex history of the Johnson Amendment — including not just its proximate origin in Johnson's reelection campaign but also its place in a century-long debate over how to treat charities under tax law — emphasizes the danger of any rush to repeal it.

Limits on political speech are always challenging, but simply removing them is fraught with problems, too.

References

Roger Colinvaux, "The Political Speech of Charities in the Face of Citizens United: A Defense of Prohibition," *Case W. Res. L. Rev.* (2012).

Philip Hackney and Brian Mittendorf, "Trump's Vow to 'Destroy' Johnson Amendment Could Wreak Havoc on Charitable World," *The Conversation*, Feb. 12, 2017.

Ann M. Murphy, "Campaign Signs and the Collection Plate — Never the Twain Shall Meet?" *Pittsburgh Tax Rev.* (2003).

Patrick L. O'Daniel, "More Honored in the Breach: A Historical Perspective of the Permeable IRS Prohibition on Campaigning by Churches," *B.C. L. Rev.* (2001). ■

Trump Calls for Historic Tax Reform, Hints at Border Adjustments

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In his first address before a joint session of Congress on February 28, President Trump gave few new specifics of his plans for tax reform, but some observers saw hints of growing support for a border-adjustable tax.

Trump issued a call for a bipartisan approach to replacing the Affordable Care Act and enacting a $1 trillion infrastructure package. He touted his administration's efforts to follow through on campaign promises like regulatory reform, which he said was being accomplished through the creation of a "deregulation task force" for each federal agency and his 2-for-1 reg elimination executive order.

Possible Endorsement of Adjustment

Citing a weak post-recession recovery, the loss of manufacturing jobs, and unemployment numbers, Trump suggested that he might take a carrot-and-stick approach to boosting the U.S. economy. "We must restart the engine of the American economy — making it easier for companies to do business in the United States, and much harder for companies to leave," he said.

Trump complained that foreign countries make U.S. companies pay "very high tariffs and taxes" on their exports, while foreign companies are able to export into the United States with little to no tax. Trump said he would change that. Notably absent was any mention of a "border tax": an amorphous proposal that Trump often mentions in the context of punishing U.S. companies with a 35 percent tax if they try to move production overseas and then sell back into the United States. He also did not come out in support of the border-adjustable tax in the House Republicans' "Better Way" tax reform blueprint.

But the language of Trump's speech, which included talk of creating a "level playing field for American companies" and the example of U.S.-based motorcycle manufacturer Harley-Davidson's difficulty doing business with other countries "because they tax our goods at such a high rate" bears a strong resemblance to the language of the House GOP's tax proposal. Trump made similar remarks at a February 27 meeting of U.S. governors, when he said he was considering a "reciprocal tax." (Related coverage: p. 1183.)

Following Trump's speech, House Ways and Means Committee member Carlos Curbelo, R-Fla.,