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May 9, 2017

Newsroom

Donald Trump vs. Roger Williams

David Logan, professor of law and former dean of RWU Law, discusses President Trump's executive order on religious freedom in this week's 1st Amendment Blog.

May 8, 2017: One of the many surprises of the 2016 presidential election was the support that the “religious right” or “evangelicals” gave to Donald Trump, a candidate with a well-documented and, indeed, audacious disrespect for traditional family values, especially the sanctity of marriage. Observers ascribe that support to Trump’s often-made promise to appoint conservatives to the Supreme Court of the United States, which could roll back abortion rights and the long-standing recognition of a stout “wall” separating church and state, which is traced to the writing and preaching of the namesake of my employer, Roger Williams University. President Trump delivered on the first item by nominating Judge Neil Gorsuch to the high court.

Now, we have another return on investment for evangelicals: On May 4, President Trump fulfilled his campaign promise to attack the “Johnson Amendment” -- to most people a relatively obscure provision of the federal tax code that prohibits partisan political activity by groups that have tax-exempt status. Passed without debate by Congress in 1954, the legislative purpose was simple: In return for making the contributions it receives from supporters exempt from federal taxation (the lifeblood of any nonprofit), the organization cannot participate in partisan elections. (The rule does not ban all political activity; voter registration efforts are fine, and so are “voter education” efforts, as long as they are not directly partisan.) As a result, the IRS has the power to strip a nonprofit of its tax-exempt status for taking sides in elections, although the power is largely theoretical. There appears to be only one example of such an outcome, and it did not involve a religious nonprofit.

When the law was passed, it did not concern most religious people because the ministers and priests that lead their churches rarely took explicit positions on political matters, let alone picking candidates in elections. This changed with the rise of the Moral Majority in the 1980s, when Christian religious leaders plunged into the “culture wars” by opposing the Supreme Court’s recognition of a woman’s right to an abortion and the rights of women and homosexuals. These religious leaders took to the pulpit to urge support for the Republican Party and, in particular, Ronald Reagan (which also meant that the mere fact that a man was divorced and remarried was no longer perceived to be a bar to the presidency).

Since the Reagan years, white evangelicals have increasingly argued that the Johnson Amendment represents an unconstitutional restriction on the rights of free speech and the free exercise of religion by religious leaders. A group formed to promote this view, the Alliance for Freedom, began its Pulpit Freedom Initiative, urged Protestant ministers to break the law and, indeed, to record their sermons and send them to the IRS in protest.

President Trump's May 4 "Presidential Executive Order Promoting Free Speech and Religious Liberty" directs the IRS that "churches should not be found guilty of implied endorsements where secular organizations would not be." While this move received media attention, it is largely a symbolic gesture that doesn't come close to repealing the Johnson Amendment, because, of course, a president cannot override a provision of the federal tax code without congressional action. But the executive order does have symbolic value for the president's political base, and I would expect Republicans in Congress to make such a move as part of efforts to "overhaul" the entire tax code in coming months. That said, observers expect that any legislative change would not totally repeal the amendment. Rather, it would continue the ban on political activity for nonprofits while exempting religious organizations.

Like many constitutional issues, the debate concerning the Johnson Amendment reflects the tension between competing aspects of the First Amendment: protections for the freedom of conscience (the right to free speech and the freedom to engage in religious activities) on the one hand, and the ban on government assistance to religion (prohibiting the "establishment" of religion) on the other. Clearly, the Johnson Amendment hasn't kept religious leaders from diving deeply into politics. Of course, there can still be legitimate constitutional arguments, especially because the amendment could well represent content discrimination by government.

It is hard to predict how these tensions would be resolved if the law as it now exists was challenged on constitutional grounds, or if the Johnson Amendment were amended to exempt religious nonprofits. But with a solidly Republican Congress and an increasingly conservative Supreme Court, the teachings of Roger Williams are certainly in jeopardy.

Professor David Logan contributed this piece to RWU's [1st Amendment Blog](#)