



Commentary

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The Five-State Requirement of IRC Section 4945(f)(2)

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Abstract: Consistently low rates of voter turnout in U.S. elections demand remedy. Antiquated legislation limits the ability of nonprofits to contribute to nonpartisan voter engagement. The article focuses on one piece of such legislation, section 4945(f)(2) of the Internal Revenue Code. First, the article outlines the legislative history of this provision and highlights the racist and classist basis of its passage. Through discussion of the ongoing harm caused by section 4945(f)(2), the article demonstrates the need for reform of this provision.

Keywords: tax policy, voter registration, philanthropy, voter turnout

1 Introduction

Section 4945(f)(2) of the Internal Revenue Code prohibits private foundations from receiving tax exemptions on contributions to charitable organizations for conducting voter registration drives, unless the drives are conducted in at least five states (26 U.S.C.S. § 4945). In practice, this means that donors cannot receive tax deductions on their giving to private foundations for the purpose of conducting voter registration drives, unless the drives are conducted in at least five states. Section 4945(f)(2) became law as part of the Tax Reform Act of 1969. Since its inception, this provision has been criticized as a means of voter suppression. Further, public testimony reveals section 4945(f)(2) as a racially motivated reaction to the role of private foundations in increasing voter turnout of people of color during the Civil Rights Movement. Although this provision is relatively brief, its implications are pervasive and detrimental to the function of nonprofits and democracy. Analysis of the legislative history of section 4945(f)(2) and the consequences of its passage illustrate the urgent need to change this provision.

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2 Background

The political basis of section 4945(f)(2) and the Tax Reform Act of 1969 developed in the early 1920s and 30s. In this period, case law and changes in tax legislation show a decline in the public's trust of the political activities of tax-exempt organizations. Such mistrust continued into the 1950s and compelled congress to open three investigations into tax-exempt organizations. The first two investigations, known as the Cox Committee and the Reece Committee, found that tax-exempt organizations were generally conducting themselves appropriately. Congressman Wright Patman, the chair of the Select Committee on Small Business, began the third and final investigation known as the Patman Report (Troyer 2000). Patman conducted this investigation over a 10-year period and produced eight different editions. Patman's findings would become one of the primary bases of the limitations set on tax-exempt organizations in the Tax Reform Act of 1969.

3 The Civil Rights Movement and Tax-Exempt Organizations

Throughout the time Patman conducted his investigation, the Civil Rights Movement advanced with aid from tax-exempt organizations. Accordingly, Patman dedicated significant portions of his report to these efforts. In particular, Patman focused on an influx of voter registration drives across the southern United States and in northern cities (Troyer 2000). In the 1960s, such voter registration drives were supported by the NAACP, the Urban League, the Congress of Racial Equity, also known as CORE, the Ford Foundation and other liberal philanthropies. Notably, in 1967, CORE received a \$175,000 grant from the Ford Foundation to register Black and low-income voters in Cleveland during the mayoral election (House Ways and Means Committee 1969). After a closely fought and bitter contest, which included complaints of police harassment of voter registration volunteers, Carl Stokes was elected mayor of Cleveland. Stokes was the first Black mayor of a major U.S. city. Patman likely considered these voter engagement activities to be direct and partisan interventions into American politics.

Beyond Patman's focus on the voter registration activities of charitable organizations, he also concentrated on indirect forms of political activity. After the 1968 assassination of Rev. Dr. Martin Luther King Jr., the Ford Foundation funded efforts to preserve the Civil Rights leader's writings. Additionally, the Ford Foundation funded collegiate programs for people of color at various southern universities (House Ways and Means Committee 1969). When Senator Robert

Kennedy was assassinated, the Ford Foundation made a number of grants to organizations and individuals associated with him. Patman considered these Civil Rights leaders to have been inherently political figures and thus, Patman deemed the Ford Foundation's contributions to have been a political abuse of charitable organizations' tax exemptions (House Ways and Means Committee 1969). Patman ultimately concluded that these organizations needed to be restrained from conducting further similar activities (Troyer 2000).

4 The 1969 Hearings on Tax-Exempt Organizations

By 1969, the national political climate was contentious and congressional leaders were concerned about partisan meddling by foundations. In preparation for drafting the Tax Reform Act, the House Committee on Ways and Means requested testimony from executives of the philanthropies implicated in the Patman Report. During the hearings, the Committee called McGeorge Bundy, Ford Foundation President, to account for the political effects of the Foundation's funding.

In Bundy's testimony, he outlined the precautions the Ford Foundation took to avoid entering the "direct political arena," as Patman had alleged in his report (House Ways and Means Committee 1969). In discussing the Ford Foundation's contributions to CORE in Cleveland, Bundy explained the Foundation's nonpartisan approach, "We sent a field team to Cleveland to consult with all and sundry, and one of the most important and pressing of the recommendations to continue the grant to CORE came from Mr. Taft, who was the defeated candidate in that election." Using Cleveland as an example, Bundy advised the congressmen to focus their legislative efforts on precautionary measures to prevent private foundations from direct political interference (House Ways and Means Committee 1969). In spite of Bundy's testimony, the Tax Reform Act of 1969 was passed into law with no mention of these precautions. Instead, with the addition of section 4945(f)(2), the Tax Reform Act broadly restricted private foundations' ability to fund voter registration services. That is, donors could no longer receive tax deductions for funding voter registration drives, unless those drives were conducted in at least five states (26 U.S.C.S. § 4945).

5 Attempt to Repeal the Five-State Requirement

The effects of the limitations set by section 4945(f)(2) were later plumbed in a June 30, 1983 Ways and Means Subcommittee on Oversight hearing on tax rules

governing private foundations. During the hearing, Vernon Jordan, an executive of the Rockefeller Foundation, testified about his recommendations for changes in tax legislation. In his testimony, Jordan emphasized the need to eliminate the five-state requirement of section 4945(f)(2). Jordan stated, “In order to bring a new organization into being, that organization could not, because of the Tax Reform Act of 1969, operate and do voter registration. I think that is an impediment. I would like to see that out.” Jordan’s testimony resulted in an amendment to the Deficit Reduction Act of 1984 that could have eliminated the five-state requirement of section 4945(f)(2) (House Ways and Means Committee 1983). However, this amendment did not make it into the Act as passed by Congress (House of Representatives Report 98-861 1984). There is no available public information to explain why this amendment would have been added to the Deficit Reduction Act only to get removed before its passage.

Since that time, section 4945(f)(2) has received little attention and has not been the subject of enforcement actions or reform proposals. There was never significant evidence of abuse of voter registration drives to justify the five-state provision. Instead, there is a compelling case to eliminate this provision and promote voter participation in the face of low levels of consistent registration and voting.

6 Moving Forward

For national or regional organizations, the five-state requirement is achievable. Such is the case of Cambridge, MA-based Nonprofit Vote, an organization dedicated to increasing voter engagement by helping nonprofits pursue nonpartisan voter registration and education (Miller and Mak 2019). Before Nonprofit Vote was established in 2005, it had to obtain a section 4945(f)(2) pre-authorization letter from the IRS that attests that their work is conducted in at least five states. Qualifying in this way does not work for a majority of U.S. nonprofits, which are state or local. These state and local nonprofits are effectively excluded from seeking private foundation funding for their voter registration activities. For the charitable organizations most likely to incorporate voter registration into their missions, private foundations are a disproportionately important revenue source. The barrier to private foundations represented by section 4945(f)(2) discourages nonpartisan voter engagement.

Repealing the five-state requirement will inevitably lead to increased voter engagement. That is, without the geographic limitations set by section 4945(f)(2), the vast majority of U.S. nonprofits will be able to pursue nonpartisan voter registration. Since voter registration legislation differs between states, state and local nonprofits will be able to focus their efforts to their distinct requirements. In

addition, state and local nonprofits will be able to use the funding more efficiently than their national counterparts. Rather than private foundations donating to a national entity who disperses the funds to state and local nonprofits, private foundations will be able to give directly to the state and local nonprofits.

Although national nonprofits can be effective in funding voter registration drives, local and state nonprofits will expand what is already possible. Local nonprofits are uniquely equipped to address the varying needs for voter registration from precinct to precinct. Although national nonprofits can still fund these smaller-scale nonprofits for voter registration, repealing the five-state requirement would allow local and state nonprofits to receive funding directly from private foundations. This would reduce overhead costs and allow private foundations to focus their funding on the communities most in need of voter registration.

For those who were in favor of section 4945(f)(2) when it was enacted, this provision represented a barrier between private foundations and the political process. Congressmen like Wright Patman were concerned that private foundations would use their resources to increase voter turnout in low-income and Black neighborhoods, just as the Ford Foundation had done in Cleveland. Patman and his colleagues were likely worried that people living in impoverished communities would vote for the party that had a record of supporting these communities, namely Democrats. Through laws like IRC section 4945(f)(2), these congressmen and their supporters continue to reduce the availability of funds for voter engagement activities to favor their own chances of election.

Repealing the five-state requirement of section 4945(f)(2) may have a partisan political effect on certain elections. This would only be the result, however, because the five-state requirement has had its own partisan political effect since it was enacted. The communities that need the most resources for voter engagement are still limited in their access to such, as Wright Patman and other Republican congressmen likely intended. The lack of voter engagement resources in these communities disenfranchises the voters who would have voted in elections had the resources been available to engage them. Section 4945(f)(2) has been suppressing the vote through suffocating communities of resources. Repealing the five-state requirement would undo this form of voter suppression. With more people being encouraged to vote, certain communities around the country may have a partisan shift because that is the change these places need to accurately represent their populations. If a political party has benefited in a certain area by suppressing voter engagement through section 4945(f)(2), then repealing this provision will cause that party to lose their advantage. Increasing voter turnout by repealing section

4945(f)(2) may have a partisan effect only because it is the opposite of the partisan voter suppression that continues to take place.

Without the five-state requirement, local and state nonprofits will begin directly receiving contributions for voter registration drives. The registration drives, however, will still be required to be nonpartisan. When there is ample funding for voter registration drives, there will likely be higher turnout rates. The goal of any fair election should be to have as close to 100% of the population participating. Increased participation in elections will mean that the results of those elections are a more accurate representation of the views of the population.

Census data shows that low-income (household income under \$30k per year), Hispanic and Asian voters routinely have the lowest rates of voter turnout. According to Nonprofit Vote, in comparison to participants of other equivalent programs, the participants of nonprofit voter engagement programs are 2.3 times more likely to be nonwhite and 1.9 times more likely to be low-income (Miller and Mak 2019). Further, turnout rates are 11 percent higher among voters contacted by a nonprofit, compared to those who are not (Miller and Mak 2019). Consequently, with more nonprofits participating in nonpartisan voter registration drives, more voters will become registered and vote in their elections.

In addition to the increase in voter engagement that would likely result from repealing the geographic limitations of section 4945(f)(2), the racist and classist fears that underscored the creation of this provision are compelling reasons for change. This country needs to reckon with the fact of institutional racism. Section 4945(f)(2) is only a small piece of legislation that was passed with racist motivations. Given that section 4945(f)(2) had such motivations and the communities it racially targeted continue to suffer the intended consequence of low voter registration, this law should be repealed. If nothing else, this provision deserves more attention than it is getting, given its history and effect on voter engagement. Among other things, this country needs to set a new precedent in addressing the racial disparities caused by laws written by racists. It is finally time to repeal the five-state requirement and appreciate charitable organizations' ability to engage voters.

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