

Refuting myths about the Russell amendment to the FY 2017 NDAA

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The National Defense Authorization Act for Fiscal Year 2017 (NDAA), HR 4909, was marked up by the House Armed Services Committee on April 27-28. The committee approved an amendment to the bill offered by Rep. Steve Russell (R-OK) reinforcing religious freedom protections afforded religious organizations that receive federal contracts or grants.

Myths about the Russell amendment

Myth 1. The Russell amendment authorizes religious contractors and grantees to refuse to serve LGBT people, same-sex married couples, or others they do not wish to serve.¹

In fact, the amendment only addresses the employment practices of religious organizations and has nothing to do with discrimination or nondiscrimination in providing services.

Some assume that only an organization that includes employees who engage in same-sex relationships can provide nondiscriminatory services to LGBT people and thus that the Russell amendment fosters discrimination in services.² This is wrong and a gross misunderstanding of religious organizations, which daily, sometimes with and often without the assistance of government funding, provide respectful and excellent services to a wide range of people who do not agree with them religiously or morally.

Myth 2. The Russell amendment is “inconsistent with the longstanding principle that federal dollars must not be used to discriminate”³—meaning that federal funds have never supported religious job discrimination.

¹ Rep. Adam Smith, ranking member of the House Armed Services Committee, is quoted as saying, “You can basically be a private contractor and this just gives you the right to discriminate if you decide you just don’t want to do business with gay people or anyone else for that matter on a discriminatory basis within a protected class” in Lisa Rein and Karoun Demirjian, “LGBT groups gird for battle against religious-based legislation in Congress,” Federal Insider, PowerPost, Washington Post online, April 29, 2016.

https://www.washingtonpost.com/news/powerpost/wp/2016/04/29/lgbt-groups-gird-for-battle-against-religious-based-legislation-they-say-could-erase-their-rights/?wpmm=1&wpisrc=nl_headlines

² Cf. David Stacy, director of government affairs for the Human Rights Campaign, said “If the government says, we’re going to fund a homeless shelter, they [a religious grantee] can refuse to hire an LGBT person to staff it even if 40 percent of the people they’re serving are LGBT.” Quoted in Rein and Demirjian, “LGBT groups gird for battle.”

³ Letter from the Coalition Against Religious Discrimination to the Chairman and Ranking Member of the House Committee on Armed Services, “Re: CARD Opposes Taxpayer-Funded Employment Discrimination Authorized by the Russell Amendment,” April 27, 2016. <http://aha->

In fact, according to fundamental federal employment law (Title VII), it is not illegal discrimination for a religious organization to consider religion when making employment decisions; rather, this religious staffing practice of religious organizations is specifically protected by two exemptions in this civil rights law. This religious staffing freedom was unanimously upheld by the US Supreme Court (*Corporation of the Presiding Bishop v. Amos*, 1987). Religious staffing by religious organizations is not “discrimination.”

The Title VII religious exemption does not vanish simply because a religious organization receives government funds. Federal grant programs rarely impose a separate employment non-discrimination requirement—and thus federal grant funds often allow such religious hiring by religious organizations. Furthermore, the Religious Freedom Restoration Act can authorize a religious organization to continue to staff on a religious basis even if a particular program includes a ban on religious job discrimination—so, again, federal grant funds often allow religious hiring by religious organizations. And, since 2002, the rules for federal contracting, which do ban religious (and other forms of) job discrimination, have included a religious exemption modeled on the Title VII exemption. President Obama specifically retained this religious exemption when he amended federal contracting regulations to prohibit discrimination on the bases of sexual orientation and gender identity. So, here, federal contract funds permit religious hiring by religious organizations.

Myth 3. The Russell amendment rolls back expanded LGBT rights, going against the Supreme Court’s guarantee of rights to same-sex couples.⁴

In fact, the Russell amendment affirms existing federal law with respect to religious staffing by religious organizations: it creates no new law but only requires adherence to existing federal law, as is evident by its reliance on existing, and long-standing, religious exemptions. The amendment references the ADA religious staffing exemption language, which specifically authorizes religious organizations to require employees to adhere to the organizations’ “religious tenets” only to clarify that when a religious organization is free to “employ employees of a particular religion,” to use the phrase from the Title VII exemption, that freedom allows the employee to ensure that the applicant or employee is faithful to the religion of the religious employer. Title VII itself defines “religion” to encompass “all aspects of religious *observance and practice*, as well as belief” (42 USC 2000e(j)).

Religious organizations with a religiously based code of conduct for employees are already exempt from nondiscrimination rules that conflict with their ability to hire individuals who share their religious mission; the Russell amendment only confirms this exemption. The Supreme Court’s same-sex marriage decision requires states to treat same-sex and opposite-sex marriages

files.s3.amazonaws.com/2/71/d/5943/2016-04-27_CARD_Letter_on_Russell_Amendment_on_NDAA.pdf

⁴ “The Human Rights Campaign called it the first legislation to pass a congressional committee that would roll back expanded rights for lesbian, gay, bisexual and transgender people at the federal level since the Supreme Court ruled that same-sex couples must be allowed to marry.” Rein and Demirjian, “LGBT groups gird for battle.”

as equivalent but does not dictate who religious employers must hire in furtherance of their religious missions.

Myth 4. The Russell amendment authorizes any private organization that receives federal funds to hire based on religion, disregarding nondiscrimination laws.⁵

That is incorrect. The amendment (which is quoted below) expressly applies only to a “religious corporation, religious association, religious educational institution, or religious society” that receives federal funds. The three existing religious exemptions that are referenced in the amendment also apply only to religious organizations.

Facts about the Russell amendment

The purpose of the Russell amendment is to reaffirm the existing protection in federal law that religious organizations, even when they receive federal funding, are free to maintain staffing policies that are consistent with their religious missions. Federal employment law, and also federal contract law, contains specific exemptions that permit religious organizations to consider religion when hiring and firing. Courts have interpreted these exemptions to allow the religious organizations to assess a job applicant’s or employee’s religiously relevant conduct, not just their *stated* agreement with the organizations’ respective religious creeds. Thus, for example, a religious employer that limits hiring to Catholics who support its Catholic mission can decide who is “Catholic” based not just on whether applicants state they are Catholic, but also based on whether they agree to live in accordance with the Catholic Church’s teachings.

However, this protection has become less obvious in the wake of President Obama’s action that forbids federal contractors from discriminating based on sexual orientation or gender identity, while also leaving intact the religious staffing exemption. The Office of Federal Contract Compliance Programs has not clarified how it interprets the intersection between the freedom of religious federal contractors to consider religion when staffing and the new requirement that contractors not discriminate based on sexual orientation or gender identity.

The amendment (quoted below) requires federal contracts and grants (and some other financial assistance) to include “protections and exemptions consistent with” three named long-standing religious exemptions (quoted below) in federal law that protect the freedom of religious organizations to consider religion when hiring and firing employees. The amendment only addresses the employment practices of religious organizations, allowing them to hire individuals who share and can further their mission. It has nothing to do with how an organization receiving federal funds must provide services.

The first two referenced exemptions are in Title VII of the 1964 Civil Rights Act, the fundamental federal rule about employment nondiscrimination. These exemptions permit religious organizations, including educational institutions, notwithstanding a general ban on religious job discrimination, to consider religion (give preference to “individuals of a particular

⁵ Rep. Adam Smith, “The way this amendment is written, it doesn’t matter if you are a religious organization.” Quoted in Rein and Demirjian, “LGBT groups gird for battle.”

religion”) when deciding who to hire and fire for any and all positions in the religious organization. The third referenced exemption, from the 1990 Americans with Disabilities Act, has the same language, with the clarification that the religious organization “may require that all applicants and employees conform to the religious tenets of such organization.”

Federal contract law, which forbids religious job discrimination, includes the language of the first exemption from Title VII. Federal grant programs generally are silent about employment discrimination, such that religious organizations that receive federal grants do not lose their religious staffing exemption from Title VII. Some federal grant programs do include a nondiscrimination requirement that bans religious (and other forms of) job discrimination; however, the Religious Freedom Restoration Act permits religious organizations that staff on a religious basis to participate in these programs if being excluded would be a substantial burden on their religious exercise⁶, as the Obama administration has affirmed.⁷

The effect of the Russell amendment is to confirm the court decisions interpreting the religious staffing exemptions in federal law to encompass the practice of a religious organization to consider religion when hiring and firing, including to assess whether a job applicant or an employee who professes the religion of the employer is, in the eyes of the employer, faithful to that religion as understood by the employer. The confirmation removes the uncertainty that has come into federal funding (federal contracting, in the first instance) because of a lack of clarity from the Federal Office of Contract Compliance Programs and the propensity of some officials and activists to assert that bans on sexual-orientation and gender-identity discrimination override the religious staffing protection.

The language of the Russell amendment

The amendment adds to the NDAA the following new section, “Protections Relating to Civil Rights and Disabilities”:

Any branch or agency of the Federal Government shall, with respect to any religious corporation, religious association, religious educational institution, or religious society that is a recipient of or offeror for a Federal Government contract, subcontract, grant, purchase order, or cooperative agreement, provide protections and exemptions consistent with sections 702(a) and 703(e)(2) of the Civil Rights Act of 1964 (42 U.S.C. 2000e-1(a) and 42 U.S.C. 2000e-2(e)(2)) and section 103(d) of the Americans with Disabilities Act of 1990 (42 USC 12113(d)).

⁶ Department of Justice, Office of Legal Counsel, opinion memorandum, “Application of the Religious Freedom Restoration Act to the Award of a Grant Pursuant to the Juvenile Justice and Delinquency Prevention Act” (June 29, 2007).

<https://www.justice.gov/sites/default/files/olc/opinions/attachments/2015/06/01/op-olc-v031-p0162.pdf>

⁷ Department of Justice, “Frequently Asked Questions. April 9, 2014. Nondiscrimination Grant Condition in the Violence Against Women Reauthorization Act of 2013.”

<https://www.justice.gov/sites/default/files/ovw/legacy/2014/06/20/faqs-ngc-vawa.pdf>

The referenced religious exemptions

The reference to three long-standing religious staffing exemptions--

1. Section 702(a) of the Civil Rights Act of 1964, Title VII (42 USC 2000e-1a):

§ 2000e-1. Exemption

(a) Inapplicability of subchapter to certain aliens and employees of religious entities

This subchapter shall not apply to an employer with respect to the employment of aliens outside any State, or to a religious corporation, association, educational institution, or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities.

2. Section 703(e)(2) of the Civil Rights Act of 1965, Title VII (42 USC 20000e-2(e)(2)):

(e) Businesses or enterprises with personnel qualified on basis of religion, sex, or national origin; educational institutions with personnel of particular religion

Notwithstanding any other provision of this subchapter, . . . (2) it shall not be an unlawful employment practice for a school, college, university, or other educational institution or institution of learning to hire and employ employees of a particular religion if such school, college, university, or other educational institution or institution of learning is, in whole or in substantial part, owned, supported, controlled, or managed by a particular religion or by a particular religious corporation, association, or society, or if the curriculum of such school, college, university, or other educational institution or institution of learning is directed toward the propagation of a particular religion.

3. Section 103(d) of the Americans with Disabilities Act of 1990 (42 USC 12113(d)):

(d) Religious entities (1) In general

This subchapter shall not prohibit a religious corporation, association, educational institution, or society from giving preference in employment to individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities.

(2) Religious tenets requirement

Under this subchapter, a religious organization may require that all applicants and employees conform to the religious tenets of such organization.

Useful Resources

On the scope of the religious exemptions in Title VII and federal contracting:

Carl H. Esbeck, “Federal Contractors, Title VII, and LGBT Employment Discrimination: Can Religious Organizations Continue to Staff on a Religious Basis?” 4 *Oxford Journal of Law and Religion*, 368 (2015).

On court decisions interpreting the scope of the religious exemptions:

Carl H. Esbeck, “Differences: Real and Rhetorical: Responding to Non-Discrimination Executive Order and Religious Freedom,” *Cornerstone* blog, Religious Freedom Project at the Berkley Center, Georgetown University, July 22, 2014. <http://berkleycenter.georgetown.edu/cornerstone/non-discrimination-executive-order-and-religious-freedom/responses/differences-real-and-rhetorical>

Carl H. Esbeck, “Federal Contractors, Title VII, and LGBT Employment Discrimination: Can Religious Organizations Continue to Staff on a Religious Basis?” 4 *Oxford Journal of Law and Religion*, 368 (2015).

On the constitutionality of religious exemptions,

Carl H. Esbeck, *When Religious Exemptions Cause Third-Party Harms: Is the Establishment Clause Violated?*, 58 *Oxford J. of Church & State* (Winter 2016).

On the importance of clarifying the intersection between the freedom to consider religion in staffing and the obligation not to discriminate based on sexual orientation and gender identity:

Stanley Carlson-Thies, “Bootstrapping an Interpretation into an Imperative: Responding to Non-Discrimination Executive Order and Religious Freedom,” *Cornerstone* blog, Religious Freedom Project at the Berkley Center, Georgetown University, August 21, 2014. <http://berkleycenter.georgetown.edu/cornerstone/non-discrimination-executive-order-and-religious-freedom/responses/bootstrapping-an-interpretation-into-an-imperative>

Douglas Laycock, “Neither Side Got What It Wanted: What Obama’s Non-Discrimination Executive Order Means Going Forward,” *First Things* online, July 31, 2014. <http://www.firstthings.com/web-exclusives/2014/07/neither-side-got-what-it-wanted>

On the religious staffing freedom in the context of federal funding and the Religious Freedom Restoration Act

Carl H. Esbeck, Stanley W. Carlson-Thies, and Ronald J. Sider, *The Freedom of Faith-Based Organizations to Staff on a Religious Basis* (Washington, DC: Center for Public Justice, 2004). <http://www.irfalliance.org/resources/religiousstaffing.pdf>

Douglas Laycock, Letter to Attorney General Eric Holder, re letter requesting withdrawal of the Office of Legal Counsel memorandum on the Religious Freedom Restoration Act, Nov. 13, 2009. <http://mirrorofjustice.blogs.com/files/laycockholderrerfra.pdf>