

## 501(c)(3) Politics Executive Order: What Effect?

06.14.17 | Linda J. Rosenthal, JD



For over a year, there's been serious chatter in certain quarters about [easing the 100% ban](#) – the Johnson Amendment – on political campaign activities by 501(c)(3) organizations including churches and religious groups.

It was part of the GOP campaign rhetoric and has continued on in the new Administration. There's disagreement, though, on the details. Should the ban be eliminated completely? Should the Johnson Amendment be modified to allow limited activity? Should there be a carve-out for religious organizations only? There is a strong consensus in the philanthropy community opposing any change at all. Recently, we've highlighted this debate: "[Will The 501\(c\)\(3\) Politics Ban Be Repealed?](#)"; "[Why Change the Politics Ban: The Proponents' View](#)"; and "[Opponents of Politics-Ban Repeal Speak Out.](#)"

### *The 501(c)(3) Politics Executive Order*

Speculation focused on whether lawmakers would seek a change by standalone legislation or include it as part of a comprehensive tax-overhaul package.

This uncertainty was swept away on May 4, 2017 with the White House issuing "Executive Order Promoting Free Speech and Religious Liberty. There are several sections; this link is to the full text. Section 2 relates to 501(c)(3)s and the Johnson Amendment:

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*Respecting Religious and Political Speech. All executive departments and agencies (agencies) shall, to the greatest extent practicable and to the extent permitted by law, respect and protect the freedom of persons and organizations to engage in religious and political speech. In particular, the Secretary of the Treasury shall ensure, to the extent permitted by law, that the Department of the Treasury does 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, where speech of similar character has, consistent with law, not ordinarily been treated as participation or intervention in a political campaign on behalf of (or in opposition to) a candidate for public office by the Department of the Treasury. As used in this section, the term “adverse action” means the imposition of any tax or tax penalty; the delay or denial of tax-exempt status; the disallowance of tax deductions for contributions made to entities exempted from taxation under section 501(c)(3) of title 26, United States Code; or any other action that makes unavailable or denies any tax deduction, exemption, credit, or benefit.*

### **Analysis of the 501(c)(3) Politics EO**

Experts hurriedly reviewed and analysed this Executive Order. Based in part on one or more drafts that were making the rounds, the American Civil Liberties Union and other opponents were poised to pounce.

Hours later, though, after time to digest the official (final) version, the general reaction was: “Meh.” “There’s nothing ‘there’ there,” read one tweet. Another chimed in: “It’s a nothingburger.”

The [ACLU stood down](#). It has bigger fish to fry.

Legal eagle Dahlia Lithwick does not mince words in “Lawyers to the Rescue!”: “Trump’s religious liberty executive order,” she writes, “reads like it was lawyered to death.”

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There is a lingering question about whether the executive order on religious freedom Donald Trump signed in the Rose Garden on Thursday ... did something, nothing, or less than nothing. Whatever it is the president ultimately did sign, it bore little to no resemblance to the draft orders that had been circulating on Capitol Hill and that had stirred such angst among progressives. It's just unclear what this EO actually does. Two of the most controversial provisions—one that would have abetted religious conscience objectors in escaping the Affordable Care Act's contraceptive coverage mandate and one that would have loosened prohibitions on participation in political campaigns by churches and other tax-exempt groups that accept tax deductible contributions—had been watered down thoroughly by the time Trump was brandishing his pen. So much so, in fact, that by the end of the day Thursday, conservatives were slamming the effort as 'meaningless' and 'inadequate.' Meanwhile, the ACLU—which had announced earlier in the day that it had planned to file a challenge—simply tweeted: 'We thought we'd have to sue Trump today. But it turned out the order signing was an elaborate photo-op with no discernible policy outcome.'

### *Additional Commentary and Analysis*

"Would you like some onion rings with that nothingburger?" For those wanting to delve deeper into the May 4th Executive Order, there are many excellent analyses; see, for example:

- [What Happened to the Johnson Amendment? The Effect of Today's Executive Order on Nonprofit Organizations](#) [*"The Executive Order ... does not (and cannot) overturn the Johnson Amendment, ... but it appears to direct the Department of Treasury to treat religious charities and religious issues differently when considering enforcement of the Johnson Amendment"*]
- [UPDATE: President Trump Signs "Johnson Amendment" Executive Order Limiting Treasury's Actions Against Religious Organizations Engaged in Political Campaign Activities](#) [*"The executive order is unlikely to have any meaningful practical effect because, as has been widely reported, the Johnson Amendment is not currently being enforced"*]
- [Trump Signs Executive Order On Religious Political Activity](#) [*"While legal analysts are correct that the Order does not actually change the current state of the law, it is likely to have significant implications in the real world. Religious groups ... are much more likely to*

*think that they can endorse or oppose candidates without suffering an 'adverse action' by the IRS"]*

- *Substance Lacking In Lobbying Executive Order ["Observers said the EO doesn't change existing regulations much, if at all, since the Internal Revenue Service (IRS) so rarely enforces the Johnson Amendment,..."]*
- *President's Religious Liberty Order Might Not Change IRS At All ["(It)... does not seem to do very much. It would have been amazing if it did, because the IRS has not really been doing anything about church political activity"]*

## **Conclusion**

Undoubtedly, this May 4th Executive Order is not the last word on 501(c)(3)s and political campaign activity. It may be modified or Congress may decide to take additional action or – well – who knows these days?