

Why Change the Politics Ban: The Proponents' View

03.15.17 | Linda J. Rosenthal, JD



The hoped-for window to repeal the Johnson Amendment, the politics ban in section 501(c)(3) has just opened. GOP leadership along with some religious organizations and leaders are eager to get going, but – so far – there’s little consensus on how to do it: total repeal for all exempt organizations, including religious groups; total repeal, but only for religious groups; partial repeal or a narrow carve-out of some sort?

The White House and Congress aren’t necessarily on the same page all the time, and several different approaches have been undertaken so far.

In [“Will the 501\(c\)\(3\) Politics Ban Be Repealed,”](#) we set out some of the different rhetoric and legislative approaches undertaken so far. Much of it seems focused on arguments of free speech and religious liberty.

A Carve-Out Solution

The identical, companion bills filed in early February by Senator James Lankford (R-OK) and Rep. Steve Scale (R-LA) represent a “tweaking” approach rather than an all-out assault on the Johnson Amendment. This legislation has attracted the most attention (and cosponsors) so far.

It’s also been accompanied by an op-ed in The Washington Post on February 5, 2017, by the main sponsors explaining their reasons for wanting a change as well as why they structured their legislation the way they did. The title is: “U.S. nonprofits, including churches, should be allowed to take sides in politics.”

The subtitle sets out a key argument: “The Johnson Amendment forces people to wear a muzzle in exchange for tax-exempt status.”

The authors assert that the politics ban has, since its enactment in 1954, “effectively censored all nonprofit organizations and their leaders with the threat of an IRS investigation, fines or loss of tax-

exempt status if they choose to discuss political events.”

They point out the haphazard manner in which the Johnson Amendment “was snuck in by voice vote but was never debated by Congress.” This is perhaps one of the best reasons supporting a reevaluation if not a complete repeal; it has loomed so large over the nonprofit world for many decades but it has a [dodgy legislative history](#). More precisely, it has no legitimate legislative history at all. It was submitted by a floor amendment, and there is some evidence that it was a mistake; that then Senate Majority Leader Lyndon B. Johnson intended the politics language to mirror the pre-existing less-than-absolute lobbying limits expressed in 501(c)(3).

A key theme in this op-ed is that “people that work at nonprofits, charities and houses of worship have major restrictions on their freedom of speech” and “live under a shadow of fear when voicing their beliefs.”

These legislators then explain their selected approach to a fix for the Johnson Amendment problem.

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Specifically, our legislation would ensure that all 501(c)(3) organizations, including nonprofits, charities and houses of worship are legally able to make comments about a political issue within the scope of their normal activities. An environmental nonprofit that sends out an e-newsletter educating its readers about the climate positions of candidates wouldn't have to fear an audit. A church employee who distributes election voter guides (for which her church did not incur any cost for distribution) could not be punished by the IRS.

“The bill also requires,” they emphasize, “that any expenditure related to these activities are *de minimis* — that is, only minimal and not outside the usual expenses of the organization — to ensure that the organization’s primary function remains charitable or religious in nature.”

Addressing Concerns

Preemptively addressing some of the objections already expressed by opponents of a change in the politics ban, they assert that their proposed legislation “would not turn nonprofits and churches into political action committees, as some [have claimed](#).” This reference is to a strong article published last September by Americans United for Separation of Church and State that emphasized a fear among many opponents, including nonprofits and community and political leaders that the scourge of huge amounts of “dark money” would flow furtively into religious groups in the guise of charitable contributions.

Returning again to the main theme, they argue:

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The criticism that our legislation would subsidize religious organizations’ politics demonstrates a double standard for faith-based entities. Leaders and employees of other entities that receive federal funding – such as hospitals and universities – are welcome to advocate for political causes and contribute to them. The IRS does not threaten to punish them when they engage in political speech. Critics who say this blurs the line between church and state misunderstand the principle. Thomas Jefferson’s “separation” coinage doesn’t mean that there is a wall of separation between the two; it just means that the state should not have control over the church, nor shall the church maintain control over the state.

Conclusion

A final point raised is the legitimate assertion that “the Johnson Amendment has been inconsistently enforced, citing several, specific examples. There are few who would argue that point, even within the Internal Revenue Service.