

# Maybe 'Never Mind' about That 501(c)(3) Ban on Politics

12.13.16 | Linda J. Rosenthal, JD



We may be on the verge of an [Emily Litella](#) moment: “Never Mind.”

For readers not old enough to remember Saturday Night Live in the 1970’s, there was a popular sketch character played some 26 times by the late Gilda Radner. She is an “elderly woman with a hearing problem, ... attired in a frumpy dress, sweater, and [old-fashioned] glasses.” She would pop up in the Weekend Update segment, “introduced with professional dignity by the news anchors, who could sometimes be seen cringing slightly in anticipation of the malapropisms they knew would follow.” After they corrected her, she would mumble a high-pitched: “Never mind.”

## *The Politics Ban: What Now?*

This past summer, we published a raft of blog posts about the absolute prohibition in 501(c)(3) of political campaign activities: eight of them, actually, because it’s *that* important! See:

- [The Political Ban in 501\(c\)\(3\): Its Odd History](#) (6/23/16)
- [Politics, 501\(c\)\(3\)s, and the Clergy](#) (7/26/16)
- [Political Activity and 501\(c\)\(3\)s: What’s Allowed, Part 1](#) (8/2/16)
- [Political Activities and 501\(c\)\(3\)s: What’s Allowable, Part 2](#) (8/11/16)
- [Political Activities and 501\(c\)\(3\)s: What’s Allowable, Part 3](#) (8/23/16)
- [Political Activities and 501\(c\)\(3\)s: What’s Allowable, Part 4](#) (9/6/16)
- [Political Activities and 501\(c\)\(3\)s: What’s Allowable, Part 5](#) (9/15/16)
- [Public Charities and Ballot Initiatives](#) (9/29/16)

We planned a post-election article about the political ban and social media because elections in the United States seem to be nonstop. As soon as one is over, the next one starts.

But, then, there was November 8th.

Perhaps we're about to hear "never mind" about all of that political-ban stuff. The GOP has long had repealing the so-called Johnson Amendment on its wish list; it was included expressly on this year's party platform.

### *It Was Just an Afterthought, Anyway*

It may not necessarily be a particularly heavy lift to wipe it off the federal tax statutes in any event.

In our June 23rd post, we related the [odd history of the 501\(c\)\(3\) political ban](#) that played out in the hot Washington, D.C. summer of 1954 as lawmakers overhauled the federal tax code. At best, it was an afterthought; there are indications as well that Senate Minority Leader Lyndon B. Johnson may have been mistaken about the contents of language he strong-armed through at the eleventh-hour. Alternatively, it may have all been a shady maneuver designed to undercut a political opponent's favorite charity.

What's the significance of these colorful circumstances? Simply this: Present day politicians looking to modify or eliminate the politics ban may point to this dicey "legislative history" as support for its change or elimination.

### *The Current Political Reality*

"To a roomful of Christian "values voters" in September, Donald Trump joked that repealing the so-called Johnson Amendment was his only hope for getting into heaven. Nonprofit leaders are about to find out how badly he wants to walk through those pearly gates."

Indeed, that sentiment was repeated numerous times during the presidential campaign. At the 2016 Values Voters Summit, an annual conservative gathering hosted by the Family Research Council, ... the then-candidate said he'd "knock out" the Johnson Amendment. The GOP [official platform](#) for election 2016 also includes an express provision calling for its repeal.

"Many conservative church leaders say the law impinges on free expression and should be amended to allow for minimal political speech in the course of normal activities, like sermons."

Opponents of changing the law say doing so would dramatically alter how nonprofits raise and spend money and lead to a proliferation of churches and 501(c)(3) groups being created with purely political aims." This sentiment was expressed by an observer during the summer campaign: "If the Johnson Amendment were repealed, [pastors would be able to endorse candidates](#) from the pulpit, which they're currently not allowed to do by law. But it's also true that a lot more money could possibly flow into politics via donations to churches and other religious organizations. That could mean religious groups would become much more powerful political forces in American politics—and it would almost certainly tee up future court battles."

Some worry that if 501(c)(3) nonprofits and churches are given even a little room to be political, they'll push boundaries and divert money from their stated missions into partisan campaigning. "If you make *de minimis* political activity legal, people are likely to push it further in ways that we haven't yet seen," says Noah Bookbinder, executive director of the progressive government-

accountability group Citizens United for Responsibility and Ethics in Washington.

“Should the Johnson Amendment be altered, ... charities and churches would be highly attractive to political donors because their contributions, on top of being anonymous, would also be tax-deductible — a benefit not currently offered for direct campaign contributions. It would be particularly hard to track political spending by churches, ... because they do not have to file informational Form 990s to the IRS.”

Still, “Christian leaders insist that limiting political speech to “regular activities” would safeguard nonprofits and churches from becoming havens for ‘dark’ campaign money.”

“Amending the Johnson Amendment in this way, and not simply repealing it entirely, relaxes the speech restrictions on all Section 501(c)(3) nonprofit entities and allows them the breathing room to communicate how candidates have addressed their issues,” Tony Perkins, president of the conservative Christian group the Family Research Council, wrote in a September statement.

“It would be difficult to define what ‘regular’ activities are and the IRS may hesitate to apply subjective standards” on top of the general skittishness by the agency following the fallout from the 501(c)(4) mess a few years ago.

There may be less support in Congress than expected for a full repeal. “A bill entitled the Free Speech Fairness Act, introduced in the House of Representatives in September, would have allowed churches and charities to engage in political speech during “ordinary” activities. Curiously, it attracted few backers.

### *Conclusion*

A repeal – full or partial – may be attempted “through tax reform or other legislation, or by non-enforcement by a Trump Internal Revenue Service.”

Who knows?

— *Linda J. Rosenthal, J.D., FPLG Information & Research Director*