

501(c)(3) Post-Election Advocacy

12.10.20 | Linda J. Rosenthal, JD



The most consequential Election Day of our lifetimes is now in the rear view mirror.

For the nation's 501(c)(3) organizations as well as the communities and beneficiaries they serve, the stakes have been profound. The two parties and their candidates up and down the tickets offered sharply distinct philosophies and policy prescriptions.

There is always a tension between what the nonprofit sector *wants to do* and *what it's permitted to do* under the law. That push-and-pull is ordinarily tense and tiring; this season – on top of the COVID-19 crisis – it's been exhausting.

The natural instinct is to step back briefly from the political and legislative arenas; to take a much-needed break during this holiday season. But these are not normal times. The difficult reality is that we cannot afford a respite. There's too much critical work to do immediately.

Front and center right now are:

- Election/appointments of at least *three* new U.S. senators and (so far) two House members
- Georgia runoff elections that could tip the Washington, D.C. balance of power
- Executive branch (Senate-confirmable) nominations
- Executive branch (non-confirmable) appointments
- Transition team activity, planning, and policy development
- Proposal and drafting of executive orders
- Pending and proposed legislation in Congress including on urgent COVID-19 relief bills

And that's just at the federal or national level. There is heavy activity by state and local executive branches and legislative bodies around the nation. For instance, the California Legislature

reconvened on December 7, 2020 – as previously scheduled – for a special session to take up the necessary business not done because of COVID-19 recesses last term and the crush of pandemic-related priorities.

A 501(c)(3) Road Map

You probably need a good road map right about now.

One that begins – but does not end, as we’ll see in the next sections – with the basics; namely, the no-frills federal statute that defines which organizations qualify for the most favorable type of tax exemption.

That’s section 501(c)(3) of the Internal Revenue Code: just 132 words long in a single paragraph. The text is here; scroll down a bit to get to subsection (3). The version of section 501(c)(3) in use today is substantially the same as the one enacted as part of the massive overhaul of the federal tax laws in 1954.

For purposes of our discussion, the key statutory clauses are in the latter part of that paragraph. Using not entirely precise but common shorthand references, they are:

- The “lobbying limits” (27 words)
- The “politics ban” (the final 31 words)

There’s nothing all that unusual about a statute that’s as short as an average elevator pitch. The executive branch – here, Treasury/IRS – is authorized to step in and flesh out the details, subject to legislative and court oversight. Take a peek at the charities section of the IRS website to get an idea of the scope and range of in-depth explanations and links to published guidance and rules developed over many decades.

Of course, the process of interpreting and applying a statute is much easier if there is solid legislative history. For section 501(c)(3), some historical information and background exists; more so as to the lobbying limits than the politics ban.

Back in the middle of 2016, just as that year’s presidential-election season was heating up, we took a deep dive into the matter of how exactly section 501(c)(3) became ... section 501(c)(3): particularly the lobbying and politics clauses. Our post on that topic, *The Political Ban in 501(c)(3): Its Odd History* (June 23, 2016), begins: “We in the philanthropic community are – along with the rest of the nation – deep in the muck of perhaps the most bizarre election season in recent memory. There’s an added dimension to our bewilderment; namely, how to skirt the quicksand of the absolute ban in Section 501(c)(3) on political activities.”

If only we knew back then

Anyway, back to the development of our modern tax-exemption statute: The history is colorful, if not entirely illuminating. And it *does* clear up why so many people refer to the politics ban as the “Johnson Amendment.”

Front and center in the drama is the future President of the United States, then Senate Minority Leader Lyndon Baines Johnson. Imagine him then, in 1954, in a proverbial smoke-filled back room in the United States Capitol. Although the Democrats were still in the minority (until January 1955, when he became majority leader), LBJ was already a formidable figure, “known for his domineering personality and the ‘Johnson treatment,’ his aggressive coercion of powerful politicians to advance legislation.” He was determined to be a force in this landmark rewrite of the nation’s tax laws.

As events unfolded, LBJ was responsible for slipping in – at the eleventh-hour – an amendment with those critical final words at the end of 501(c)(3); namely, “and which does not participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of any candidate for public office.” [The phrase “(or in opposition to)” was inserted for clarity by an amendment a few decades later.]

We explain in our 2016 post how he maneuvered this language into the final version of 501(c)(3) through a “floor amendment.” That’s a Senate procedure usually reserved for non-germane matters for which there’s ordinarily little or no debate or deliberation. On top of it all, Minority Leader Johnson was reportedly mistaken about the pertinent legislative history and the effects of his amendment; that is a complete, rather than partial, ban on political-campaign activities. There was also speculation about his less-than-charitable motives in pushing this provision, including – apparently – a desire to harm a local charity that had supported a political opponent.

In any event, here we are. The Johnson Amendment – with which nonprofits have been agonizingly trying to comply for 75 years – is alive and well, despite continual rumors and reports of its demise.

Advocacy Prism

For some time, philanthropy leaders have promoted the importance of “nonprofit advocacy” as the prism through which our sector should plan and carry out interactions with government leaders as well as with the general public. It’s a concept often misconstrued as synonymous with the 501(c)(3) lobbying restrictions. This “advocacy” is much broader in scope and effect. It’s also relevant to understanding the Johnson Amendment, which is *not* a cut-and-dried prohibition on any and all contact between our sector and officials, legislators, or even candidates for public office.

During the current political transition, organizational and thought leaders are at five-alarm-fire level in urging our sector to adopt and implement “nonprofit advocacy.” An excellent introduction is BoardSource’s *What is Advocacy?* See also the website of Stand for Your Mission, a campaign initiated by BoardSource that – together with the Alliance for Justice, the Champion Foundation, the National Council of Nonprofits, and the United Philanthropy Forum – is “designed to unleash the power of the nonprofit sector through advocacy.”

And you won’t want to miss the outstanding resources from Bolder Advocacy, a program of Alliance for Justice. Its sole purpose is to promote “active engagement in democratic processes and institutions by giving nonprofits and foundations the confidence to advocate effectively and by protecting their right to do so.” See, particularly, these important Bolder Advocacy publications, downloadable free-of-charge in PDF format, with helpful tables of content:

- *The Rules of the Game: A Guide to Election-Related Activities for 501(c)(3) Organizations*, Second Ed. (updated June 2018) [80 pp.] Rosemary E. Fei, Esq., Adler & Colvin, et al, for Bolder Advocacy [This easy-to-read publication covers much more than the narrow (prohibited) “political-campaign activities.”]
- *Being A Player: A Guide to the IRS Lobbying Regulations for Advocacy Charities* (June 15, 2018) [52 pp.] Gail M. Harmon, Esq., et al, Harmon, Curran, Spielberg & Eisenberg, LLP for Bolder Advocacy [“A user-friendly guide that reviews federal tax laws that govern lobbying by 501(c)(3) public charities.”]

Bolder Advocacy’s much briefer Fact Sheet: *Preparing for Change: How Nonprofits Can Shape Policy By Engaging Transition Teams* 4 pp. PDF (August 26, 2020) is also invaluable. “Perhaps the best kept secret of nonprofit advocates,” write the authors, “is the importance of the time between a candidate’s election and the time they’re sworn in. This period features whirlwind planning, appointing, and hiring, but it’s also when election promises become legislative plans. The newly-elected’s transition team staff drives the agenda and speaking with them can be as important as any policy conversation for the next several years.”

See, too: *Can We Say That? Post-Election Advocacy for 501(c)(3) Organizations* (November 3, 2020) (3 pp. Fact Sheet); and *Commenting on 2020 Election Results* (November 3, 2020) Shyaam Subramanian, Esq., *Bolder Advocacy Blog*.

Specifics: Congress

The two Georgia runoff elections to choose that state’s Senate delegation are subject to the usual Johnson Amendment rules. See *Nonprofits and the Georgia Runoff Elections* (November 11, 2020) Tim Mooney, Esq., Senior Counsel, *Bolder Advocacy Blog*.

But under the current circumstances – including a worsening of the COVID-19 pandemic – there are significant efforts under way on (nonpartisan) voter education and help in getting voters to the polls or mailing in their ballots. See the website of Nonprofit VOTE, a “501(c)(3) organization founded in 2005 by a consortium of state nonprofit associations and national nonprofit networks to provide resources and trainings for the nonprofit sector on how to conduct nonpartisan voter participation and election activities.” This is an excellent and comprehensive resource on this important topic. See as well: Bolder Advocacy’s Fact Sheet, *Keeping Nonpartisan During Election Season* (3-pp. PDF); and *10 Things Your Nonprofit Can Do Now To Get Out The Vote And Engage In The Elections* (October 12, 2020) Natalie Roetzel Ossenfort, Esq., *Bolder Advocacy Blog*.

Other open Congressional seats will be decided differently.

Vice-President-elect Kamala Harris will resign her seat as one of the two California senators on or before January 20, 2021. Gov. Gavin Newsom will fill the seat for the remainder of her term or until a special election. This is a *selection* rather than an election, so the “politics ban” does not apply at all. And since the appointment does *not* involve “legislative action” within the meaning of section 501(c)(3), communicating with the governor or the public about it is outside the scope of the lobbying restrictions as well. See *Influencing Governor’s Appointment to Fill Vacant Senate or House Seat* (November 11, 2020) David A. Levitt, Esq., & Catherine Chang, Esq., *Adler & Colvin Blog*. But it

may involve *state* lobbying-disclosure rules or other tricky legal issues.

So far, there are two known and imminent vacancies that will be filled by special election. There may be more, particularly as President-elect Joe Biden announces more executive-branch appointments. New Orleans Congressman Cedric Richmond (D-LA) has accepted a senior administration post and will soon officially resign his seat. The Democratic governor of his state will call a special election during which the usual Johnson Amendment rules will apply. In addition, reportedly, Rep. Marcia Fudge (D-OH) is being chosen to become HUD Secretary. If, so, the GOP governor will call a special election in the heavily-Democratic OH-11 District but perhaps not schedule it until May or June 2021.

Specifics: Nominations

There will be Cabinet nominations (and some sub-cabinet-level selections) that require Senate confirmation. See *Senate Confirmation Votes Are “Specific Legislation,” So Know Your Lobbying Rules!* (March 20, 2014) Eric K. Gorovitz, Esq., *Adler & Colvin Blog*. For 501(c)(3)s, participation in these deliberations is an important part of the advocacy challenge.

There are many other significant appointments across the federal departments and agencies that are *not* Senate-confirmable and so do *not* fall within the 501(c)(3) lobbying rules. See the Bolder Advocacy *Preparing For Change* Fact Sheet, mentioned above.

Specifics: Exec Orders

Proposed or signed executive orders present an interesting characterization issue. The 501(c)(3) lobbying rules apply to *legislative* activity only. They do *not* prohibit attempts by 501(c)(3)s to influence the executive branch or administrative agencies with respect to regulatory matters—including executive orders.

Be mindful, though, that communications with employees of executive branch agencies who have *legislative* responsibility may require a different analysis. Similarly, charitable organizations should be careful when communicating with legislators or their staff members about potential legislative action relating to an executive order. See *EOs and EOs: Exempt Organizations and Presidential Executive Orders* (February 2, 2017) Laura Butzel, Esq., et al, Patterson Belknap Webb & Tyler LLP.

Specifics: Pending Legislation

The House of Representatives passed the HEROES Act – a COVID-19 relief package designed to avert financial disaster for individuals, businesses, nonprofits, and state and local governments – in May. Since then, Senate Majority Leader Mitch McConnell has refused to bring it to a floor vote in that chamber, despite the continual and desperate pleas from many quarters including the nonprofit sector. There are reports of a possible (but greatly reduced in scope) compromise. A bill could make it through Congress any day now. Or not.

The need to plead the case for the nonprofit sector (and for the beneficiaries and communities they serve) will continue despite whatever happens, if anything, before the Christmas recess. See, for instance, BoardSource Fact Sheet: *Working with Legislators: An Advocacy Briefing Guide for Board*

Members, 2 pp. PDF.

Conclusion

“Nonprofit advocacy can take many forms,” according to Bolder Advocacy. Simply put, “it means making the case for your cause or mission” and “in a way that will change public policy... [by] reaching audiences in a position to help make those changes.”

The nation’s 501(c)(3) organizations must join in this important challenge in these critical days.

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