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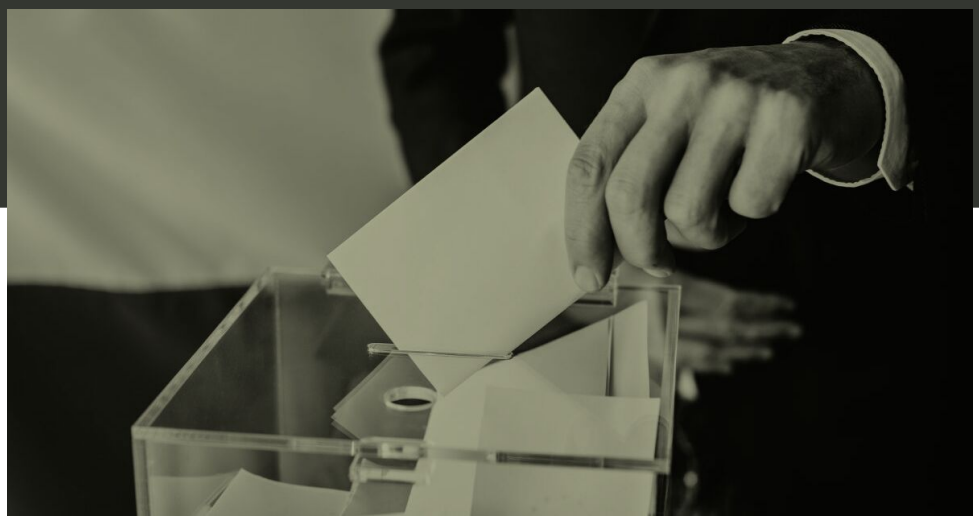
NONPROFITS: POLITICAL ISSUES

Impeachment and 501(c)(3)s: What are the Rules?

11.12.19 | Linda J. Rosenthal, JD



It's almost always election season in the United States. As soon as the votes are tallied in a just-completed cycle, the chatter begins about re-election bids and new opponents.

America's charities – expressly prohibited from engaging in any partisan political campaign activity – walk a continual tightrope trying to avoid running afoul of this section 501(c)(3) restriction, the so-called "Johnson Amendment." The lobbying rules and regulations in the federal tax code are less stringent than the 100% ban on electioneering activities, but still present challenges of interpretation and compliance.

From time to time, there are extraordinary events – like the current impeachment inquiry – that don't neatly fit into the typical "political campaign" vs. "lobbying" dichotomy.

Last year, we addressed an analogous circumstance when Justice Anthony Kennedy abruptly resigned from the U.S. Supreme Court, setting off a high-stakes and emotionally charged battle for confirmation of the man selected as his successor. In *Supreme Court Vacancy and 501(c)(3)s: What are the Rules?* (July 10, 2018), we examined possible concerns and pitfalls for the nonprofit community in reacting to, commenting on, or becoming actively involved in that confirmation proceeding that could result in "… a seismic shift in political philosophy in which several generations of legal – and particularly constitutional – precedent are turned upside down."

"Further upping the stakes," we wrote about the Kavanaugh nomination battle, "[…was…] the timing: just less than four months from an incredibly significant mid-term election cycle" in which the "legislative body that […would…] participate directly in this decision – the Senate – […was…] closely divided" with one-third of the seats up for grabs in November 2018.

Several Questions

In our July 2018 post, we posed several questions: "…What are the applicable rules for organizations that are thinking of jumping into the fray? Is this political activity subject to the 100% ban? Is it lobbying activity, permitted to some degree and with certain limits? Or – because of the timing or the extraordinary political circumstances in the U.S. … – is it a hybrid of sorts: treacherous, uncharted waters?"

The answer then: "Ordinarily, an attempt to influence the decision on a judicial appointment – even for a Supreme Court justice – is not considered prohibited political campaign activity. Instead, it's generally analyzed with reference to the lobbying rules." But the tricky timing – overlapping ongoing political campaigns – presented special hazards for the unwary charity and its personnel.

Our response in connection with last year's Supreme Court nomination appears to be instructive and relevant as well as to our nation's current impeachment crisis.

Impeachment Involvement: Is It Political?

By way of review the total ban on political activity, as well as the lobbying limits, is contained within the mere 32 words comprising the entirety of Internal Revenue Code section 501(c)(3). See IRS Publication 557 (Rev. Jan. 2018) for more detailed explanations.

Tim Mooney, senior counsel with the Bolder Advocacy program at Alliance for Justice, has some thoughts for 501(c)(3)s that "may wish to join" in the "national debate." In *Can a 501c3 Advocate for Impeachment of a Federal Office Holder?* (October 7, 2019), he notes that the Internal Revenue Service "gives no direct guidance on what 501(c)(3) public charities can do or say to support or oppose impeachment." There are, however, "…related rules that speak to possible risks."

Mr. Mooney advises that "although there is no direct IRS precedent on this, calling for the impeachment or resignation of an elected public official is probably permissible for 501(c)(3) public charities as long as they do not comment on who should be elected to succeed the ousted official." He characterizes the impeachment proceeding as involving a "vote of a legislative body," so "the activity would likely be treated as lobbying, counting toward the 501(c)(3)'s lobbying limits."

He adds an important caution, though, relevant to when (as now) the official who is the subject of the impeachment vote is running for elected office "during the impeachment inquiry or trial." The 501(c)(3) organization "should consider all of the facts and circumstances to avoid looking like it is supporting or opposing a candidate for public office."

His article, including a more nuanced analysis beyond these general conclusions, is an important reference for the nonprofit community at this challenging time in our nation's history.

So, too, is the thoughtful analysis by Eric K. Gorovitz, Esq. of Adler & Colvin in *Charity Advocacy and Impeachment: Opportunities and Risks* (September 27, 2019). He reaches a conclusion similar to Tim Mooney's. "The impeachment process," Mr. Gorovitz explains, "involves two main legislative steps: a vote in the House on Articles of Impeachment, and […if approved…] a vote in the Senate on whether to "convict" the President." They are "… legislative acts within the meaning of the federal tax law definition of lobbying" – even though they "concern whether the current President should

remain in office, and even though the President is also currently a candidate for re-election."

Conclusion

Aaron Alejandro, an experienced nonprofit director who is a member of Forbes magazine's nonprofit council, makes a related point well worth keeping in mind right now. In *Nonprofit Organizations And Politics: Be Sure To Toggle* (September 13, 2019), he reminds us of the importance of keeping separate "our private and nonprofit lives." He explains: "Toggle means to switch between functions — make the distinction obvious….When it comes to civic engagement, … make clear in which capacity you are in the democratic process."

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