IRS ISSUES

Supreme Court Vacancy and 501(c)(3)s: What are the Rules?

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Washington, D.C. is brutally hot in the summer. This year in the nation's capital, the months of July and August – and perhaps several beyond – will sizzle more than usual, now that pivotal Supreme Court Justice Anthony Kennedy has suddenly announced his retirement and President Trump has named his nominee to succeed him, Judge Brett Kavanaugh.

This will be no run-of-the-mill Supreme Court confirmation battle – if ever such a nomination could reasonably be predicted to be low-drama. The result may mean a seismic shift in political philosophy in which several generations of legal – and particularly constitutional – precedent are turned upside down.

Further upping the stakes is the timing: just less than four months from an incredibly significant midterm-election cycle. The legislative body that will participate directly in this decision – the Senate – is closely divided. With ⅓ of the seats in contention this November, the issue of the Supreme Court vacancy will loom large and directly in those campaigns, and with particular urgency for several seats that may or may not stay in the same hands or turn over.

The philanthropy sector is not a disinterested bystander to these events. Many 501(c)(3)s may be directly affected by the outcome; the sector as a whole – and American society generally – will endure some ripple effects.

So … what are the applicable rules for organizations that are thinking of jumping into the fray? Is this political activity subject to the (still applicable) 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. today – is it a hybrid of sorts: treacherous, uncharted waters?

Judicial Nominations and 501(c)(3)s

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.

By way of review, the total ban on political activity – the Johnson Amendment – as well as the lobbying rules are contained in the express statutory language of Internal Revenue Code section 501(c)(3). In just 32 words, Congress defined which organizations may qualify for this preferred category of federal tax exemption:

Corporations, and any community chest, fund, or foundation, organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes, or to foster national or international amateur sports competition (but only if no part of its activities involve the provision of athletic facilities or equipment), or for the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private shareholder or individual, ***no substantial part of the activities of which is carrying on propaganda, or otherwise attempting, to influence legislation (except as otherwise provided in subsection (h)),*** *and which does not participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of (or in opposition to) any candidate for public office.*

The bolded phrase is the rule for lobbying activities; the underlined phrase is the 100% prohibition against political campaign activity.

The Johnson Amendment prohibition refers to participating or intervening in "any political campaign on behalf of (or in opposition to) any candidate for public office." There are certain activities – a nonpartisan voter registration drive, for instance, or a nonpartisan candidate forum – that are related to elections and "electioneering" but which don't fall within the ban.

Exempt, 501(c)(3), organizations are permitted to engage in lobbying activity if "it furthers their exempt purpose, and so long as lobbying is not a substantial part of the organization's exempt activities. For more information on the politics ban as well as the lobbying rules, see, generally, IRS Publication 557 (Rev. Jan. 2018).

Muddying Up the Waters

Particularly if the judicial confirmation process drags out over several months, there may be some strategies and approaches adopted by 501(c)(3)s that could – arguably – step over the line.

Let's say that, hypothetically, one or more organizations decide that instead of *lobbying* a particular GOP Senator up for reelection on the specific issue of the judicial confirmation, it may be more productive to try to get the Democratic challenger elected. What may be permitted lobbying in the first instance may tip over into prohibited political campaign activity in the second instance.

While this example is easy to analyze, many other ideas and actions proposed and carried out in the long, hot, summer ahead may be considerably muddier and uncertain in legal consequences.

Conclusion

There's an apt, old, saying: "Forewarned is forearmed." It may date from at least the late 1500s or likely much earlier since there is a similar Latin saying – that is, "praemonitus, praemunitus" – and

Latin has been a dead language since around the fall of the Roman Empire.

In any event, then and now, it's good advice to know all of the rules and possible pitfalls and trouble spots. For 501(c)(3)s, wading into the dark waters of this Supreme Court confirmation process may be a tricky step to be approached with caution.

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