Commentary

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The 2016 Elections: Impact on the Work of Charitable Nonprofits

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Abstract: Elections have consequences. This article analyzes the 2016 election results, previews how some of the policy decisions made across the multidimensional local, state, and federal levels of governments and made by officials across the executive, judicial, and legislative branches of governments could affect the work of charitable nonprofits and private foundations, and emphasizes that the advocacy function of nonprofits is going to be more important than ever in the foreseeable future.

Keywords: 2016 elections, nonprofit advocacy, nonprofit public policy, charitable tax deduction, Johnson amendment, regulatory reform

The November 8 local, state, and federal elections produced some distinct surprises while also continuing numerous trends seen in recent years across the country. Early pronouncements from incoming and re-elected office holders suggest that policy decisions will be not only top-down from the federal government, but also bottom-up from localities and spread horizontally from one state to others.

Actions by Congress on issues like healthcare, such as altering the Affordable Care Act, will directly affect state finances – and impact the work of nonprofits beyond just those providing healthcare. State and local ballot measures on minimum wage and other policies will put pressure on Congress and other states to adjust employment laws – and affect the work of nonprofits as employers. The spread of trifecta government at the state level – as in one party controlling the governorship and majorities in both the state House and Senate – may escalate a trend among states to adopt austerity budgets and tax cuts that undermine their long-term fiscal stability.

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Some might see these and other changes in the policy ecosystem in which nonprofits operate as a three-dimensional chess board involving interactions between the federal, state, and local levels of governments. But in fact, it is even more complex. The actions and reactions are equally dynamic among the three branches of governments as judges, legislative bodies, and executives and administrative agencies exercise their separate authority and judgment. However viewed, the work of charitable nonprofits will be affected – positively and negatively – by changes in the policy ecosystem.

The following article analyzes the 2016 election results at the federal level, state level, and ballot measures, before reviewing the vital role that nonprofit advocacy will play in shaping public policy in the foreseeable future.

Making Sense of the 2016 Federal Elections

The election of Donald J. Trump as the 45th president can be cast as the voters' repudiation of "the establishment" – including both the Democratic and Republican parties, as well as the news media, K Street lobbyists, and more. For the first time in American history, the party taking control of the White House actually lost seats in the U.S. House and Senate, suggesting that past actions and conventional wisdom may be of little guide in predicting and planning for federal policies. With that caveat in mind, readers are invited to consider what is known about key policy issues affecting the work of charitable nonprofits, gleaned from candidate Trump's pronouncements and existing Congressional policy positions, particularly as announced by House Republicans.

- **Spending Priorities:** The Trump Transition office indicates that the President-Elect intends to increase defense spending to levels that exceed the agreed-upon spending caps enacted last year and the automatic budget process known as "sequestration" adopted in the Budget Control Act of 2011. As written, that law imposes automatic spending limits in equal measure to defense programs and non-mandatory domestic spending programs (that include funds for services that governments often use to hire nonprofits to provide). Calls to increase defense spending, but not domestic, would essentially require massive cuts for domestic spending, including additional reductions for programs serving human needs. On average, states receive 30 percent of their revenues from the federal government. Consequently, federal cuts to domestic spending would push additional difficult policymaking work to the state level. All of these cuts would create a double hit to nonprofit service providers: reducing financial support for work in communities while driving individuals losing those services to turn to other nonprofits under the presumption that nonprofits

and foundations will somehow, yet again, fill the unfunded voids and address community needs.

- **Tax Reform:** The Trump tax plan, which the transition team summarizes as “lower, simpler, fairer, and pro-growth,” calls for repealing the estate tax and capping itemized deductions at \$100,000 for individuals and \$200,000 for couples. The latter proposal, according to an analysis, by the Tax Policy Center – Urban Institute & Brookings Institution would cause charitable giving to decline by between 4.5 percent and 9 percent, or as much as \$26.1 billion per year. In potential contrast, the tax blueprint by House Speaker Paul Ryan (R-WI) “encourages charitable giving through a tax incentive” and tasks the House tax committee with developing “options to ensure the tax code continues to encourage donations, while simplifying compliance and record-keeping and making the tax benefit effective and efficient.” On the campaign trail, Mr. Trump also criticized nonprofit colleges and universities for amassing large endowments while increasing tuition costs, vowing to work with Congress to alter tax breaks or federal payments if institutions do not make good faith efforts to reduce costs for students.
- **Nonprofit Nonpartisanship:** Candidate Trump and his 2016 Party Platform called for repeal of the so-called “Johnson Amendment,” the federal tax law provision in place since 1954 banning 501(c)(3) charitable nonprofits and private foundations from engaging in partisan election-related activities. It is unclear whether this would be attempted through tax reform, some other legislation, or non-enforcement by a Trump Internal Revenue Service. The National Council of Nonprofits and many organizations have long recognized that 501(c)(3) nonprofits enjoy more power and independence to solve community problems by steering clear of partisanship. The current law, for instance, protects 501(c)(3) nonprofits from requests by political candidates to divert nonprofit resources away from their missions to instead fill partisan campaign war chests – which on the for-profit side can lead to “pay to play” to win government contracts. If individual organizations came to be regarded as *Democratic* charities or *Republican* charities instead of the nonpartisan problem solvers that they are, it would diminish the public’s overall trust in the sector and thus limit the effectiveness of the nonprofit community. Private foundations also benefit from the current ban preventing 501(c)(3) entities from engaging in partisan electioneering; without that ban, politicians would be hounding foundations for political contributions from foundation assets. Read more at *The Power of Nonpartisanship*, a blog posting from the National Council of Nonprofits stressing the legal right, power, and breadth of election activities in which nonprofits can engage, as long as they always remain nonpartisan.

- **Executive Orders and Regulatory Reform:** The Trump Transition office has announced that the incoming administration plans to pursue regulatory reform, including canceling several executive orders, issuing a temporary moratorium on all new regulation, and conducting “a thorough review to identify and eliminate unnecessary regulations that kill jobs and bloat government.” Likely Executive Orders facing harsh scrutiny relate to the status of immigrants, protections for gender identity, and numerous mandates on government contractors. The regulatory review effort may mirror the red-tape review process established by New Jersey Governor and Transition Office vice chair Chris Christie, a process that has resulted in significant cost savings for both nonprofits and state agencies over the past five years. See, e.g., testimony of the Center for Non-Profits, the state association of nonprofits in New Jersey. Regulatory review processes are common exercises initiated by new administrations at the federal and state levels, as reflected by the Grace Commission Reports in the first Reagan term, the Clinton-era National Partnership for Reinventing Government, and numerous government-nonprofit task forces in the states.
- **Health Care Reform:** The incoming administration promises to repeal and replace the Affordable Care Act (“Obamacare”). One potential detail, proposed this summer by Speaker Ryan, calls for changing the Medicaid health care program for low-income and disabled individuals by providing states with a choice of either per capita allotments or block grants. This approach appears to conflict with repeated statements by candidate Trump that he would not touch these entitlement programs. However a new federal system is devised, it is clear that governors and state legislators will have to adjust current state programs, financing, and other health care and bureaucratic infrastructure to accommodate federal actions. All of these changes could impose new burdens on nonprofits at the state-level advocacy arena to protect individuals, and at the local level to deliver services, healthcare and otherwise, as the system is disrupted.
- **Supreme Court:** Once inaugurated on January 20, President Trump will be able immediately to nominate a Justice to fill the seat of Antonin Scalia who died last February. Considering that the average age on the Court is 69 years old, Trump may also have the opportunity to appoint two or more other Justices during his tenure. Scholars are predicting that his nominees, if confirmed by the Senate, are likely to create a Court more receptive to challenges to abortion rights, class-action lawsuits, environmental regulations, property use, voting rights, and other issues. More immediately, the Trump administration will have the authority to alter the Obama

administration's position on a number of pending cases before the Court, including the case accepted for review in October concerning a school's obligation to accommodate transgender students. Importantly, this position-switching can occur beyond the Supreme Court to other ongoing litigation in which the federal government is a party, such as the lawsuit involving the Department of Labor's new overtime rules and numerous cases involving the environment and voting rights.

State Election Results

It is hard to argue that the repudiation of the establishment seen on Election Day in the presidential race played out with equal force at the state and local levels. There was no mass frustration or movement to throw out all incumbents and start over again. Indeed, voters re-elected incumbents to state legislatures at potentially record levels.

The elections continued the spread of Republican majorities in statehouses and governorships, with Republican trifectas now controlling governments in 25 states, compared to only six states with Democratic trifectas. Republicans control 68 of the 99 legislative chambers (a loss of one), and they added to their number of governors (33 total).

Policies generated in the states – the “laboratories of democracy” – are likely to influence federal legislation and rulemaking, just as certainly as congressional and federal administrative actions will change debates in the states. The key difference, however, is that the states will be sharing as models their examples of what they think works for their policies or ideologies, whereas the federal actors will be shoving their own decisions, such as reduced spending, onto the states and localities to implement.

State officials are not beginning with a fresh, clean slate. Half the states are already experiencing revenue shortfalls in their current fiscal years and two dozen already anticipate dealing with budget deficits in their next fiscal year. The responses to these challenges can directly affect the finances and sustainability of charitable nonprofits. Early in 2016, for instance, Louisiana sought to close a dire budget deficit by imposing sales taxes on many nonprofits during a special session. The new taxes were ultimately repealed during the regular session, but the relationship between nonprofits and governments was changed when the legislature required affected nonprofits to make annual disclosures on the value of the sales tax exemption. Further sale-tax reforms are under active consideration in the state for 2017.

States facing revenue challenges frequently cut the level of revenue sharing provided to local governments, which then often increase pressure on nonprofits to make payments to government coffers or take on more work that municipalities walk away from. Nonprofits can anticipate increases to the already numerous challenges at the state and local levels as policymakers try to fill their budget holes by seeking to impose new taxes and fees, and demand payments in lieu of taxes (PILOTs) from charitable nonprofits.

State Ballot Measure Results

While voters across the country generally stayed the course in favor of “more of the same” by supporting most incumbents at the federal and state levels, they often matched their anti-establishment vote for president with their anti-establishment votes on ballot measures. The results of the voters’ decisions were far more progressive than the candidates they elected. Consider these trends:

- Long-established statutes generally say no to marijuana, yet the people voted to legalize marijuana for medicinal or recreational use in eight out of nine states.
- The established order has largely failed to act on minimum wages, keeping them low, so the people voted for higher minimum wages in all five states where it was on the ballot. The minimum wage hourly rate is going up in four states – Arizona, Colorado, Maine, and Washington State, as well as in numerous local jurisdictions – while South Dakota voters refused to rollback a recent increase.
- The political establishment has opposed meaningful campaign finance reforms, so the people passed four separate ballot measures to the contrary: voters in Missouri, the only state without any limits on campaign donations, voted to re-impose limits on campaign contributions that had been abolished in 2008; South Dakotans approved a ballot measure that extensively revised campaign finance laws by, among other things, lowering contribution amounts to political action committees, political parties, and candidates for statewide, legislative, or county office, and setting up a voluntary publicly financed campaign system; and voters passed California’s Proposition 59 and Washington State’s Initiative 735 that urge their respective state’s congressional delegations or state’s elected officials to use their authority to overturn or repudiate the U.S. Supreme Court’s decision in *Citizens United v. Federal Election Commission* that political contributions and spending must be treated as constitutionally protected free speech.

The Policy Work Ahead for America's Nonprofits

No policy crystal ball provides a precise view into the future. Nonetheless, it is undeniable that the overall policy environment will shift radically when the new Congress and President are sworn into office. The ideologies expressed by candidate Trump who ran as an anti-establishment populist, by the establishment Republicans led by Speaker Ryan and Majority Leader McConnell who remain in power after the election, and other members of the governing coalition may not align completely. Their underlying philosophies of less government for domestic social programs, however, overlap enough to ensure massive changes driven from the federal government throughout the policy ecosystem.

These changes will surely impact the work of charitable nonprofits and private foundations in profound ways. The proposed changes in funding – of domestic programs in general and funding sources for nonprofits in particular – promise to pose serious existential threats to many charitable nonprofits. Nonprofits also will face core mission challenges as they struggle to protect, defend, and serve people in their local communities. And private philanthropy will be pressed to subsidize basic services that traditionally have been regarded as the responsibility of governments to support the people. Then again, nonprofits that engage in the regulatory reform efforts at the federal and state levels have the opportunity to secure changes that promote service delivery and reduce costs to nonprofits and governments alike.

The advocacy function of nonprofits is going to be more important than ever. It will require true nimbleness across the multiple dimensions of public policymaking, from local, state, and federal platforms to within administrative, executive, judicial, and legislative branches of government. It will require boldness to stand up and speak out, based on a resolute grounding in core values. And it will require key leadership skills, such as the communication skills of listening to communities and working with and through the media.

Advocacy work is unique in that it produces a multiplier effect: it can lift all nonprofits and the people and communities they serve. Now, more than ever, people will come to understand that the bulk of policy work has always been defensive in nature, to protect the things most cherished. Nonprofits, as our communities' problem solvers, are in the best position to engage and improve the coming policy debates.