washingtonpost.com
The Lobbying Law is More Charitable Than They Think

By Jeffrey M. Berry

Sunday, November 30, 2003; Page B01

The leaders of the nation's nonprofits do many things well, but representing their clients' interests before government is not one of them. In the course of a major research study that included interviews with the chief executives of tax-deductible nonprofits, I found them remarkably ill-informed about the primary law that governs their operations. When it comes to their rights to lobby, many believe they have no rights at all. "I have to wait until a legislator contacts us," said one executive director. Another stated unequivocally, "We're not allowed to lobby. We're not allowed to influence public policy."

Such views are not merely wrong, they're harmful. Not only can charitable nonprofits engage in more lobbying than is commonly accepted, they can lobby extensively if they take advantage of a 1976 law that the Internal Revenue Service seems to have no interest in publicizing.

Nonprofits that can offer donors a tax deduction for their contributions play a special role in American society, and that role is growing. There are more than 900,000 nonprofits now registered with the IRS, more than three times the number 25 years ago. Most are small, with no presence in Washington. Among those large enough to file a tax return (about 210,000), roughly half are either health care or social service providers. They are the foot soldiers in a largely private system that delivers critical services to the disadvantaged. They are often closer to the problems -- and the solutions -- than the policymakers in city halls, state capitals and Washington. Yet the fear of an IRS audit, no matter how unlikely, has deprived many nonprofits of their voice and has hurt the very constituencies that they intend to serve.

To gather systematic evidence on the role of nonprofits in the public policymaking process, my research team and I surveyed more than 1,700 tax-deductible nonprofits drawn randomly from IRS records. The results demonstrate that most charitable nonprofits sharply limit their advocacy before state legislatures and Congress because they worry about violating the lobbying provisions of the Internal Revenue Code. (The largest charitable nonprofits, such as the American Cancer Society and the American Heart Association, are sophisticated enough not to be intimidated by the law, but these mega-organizations are a sliver of the nonprofit world.)

A few definitions might be helpful here. Charitable nonprofits, whose tax-deductible status is an enormous benefit for their fund-raising efforts, are often referred to as 501(c)(3)s, after that portion of the IRS Code. Nonprofits that cannot offer a tax deduction to their contributors -- such as labor unions and trade associations -- are regulated under different provisions of section 501. These 501(c)(5)s and 501(c)(6)s are free to engage in unlimited lobbying.

We found that the typical executive director of a 501(c)(3) has little understanding of what the law actually says. Almost half of those surveyed are so ignorant of the law that they don't even believe their organization has the right to take a public stand on federal legislation (perfectly permissible), while 45 percent believe they are not allowed to sponsor a debate featuring candidates running for public office (they can't support a candidate, but a candidate forum is just fine).

There's good reason why many nonprofit leaders have trouble understanding what they can and cannot do in the public policymaking process. The law is a patchwork of confusing, contradictory and unworkable provisions. The heart of the problem is that 501(c)(3) says that nonprofits may lobby but not to any "substantial" degree. Despite repeated requests over the years, the IRS resolutely refuses to define what qualifies as "substantial." Nonprofits are left to guess.

Yet, nonprofits are allowed to educate legislators and staffers without constraint. So leaders of nonprofits believe they can "educate" substantially, but not "lobby" substantially. For political scientists, this is a preposterous distinction. To educate policymakers *is* to lobby.

The inconsistencies and contradictions under 501(c)(3) are breathtaking -- they're a logician's nightmare. Nevertheless, it is difficult to simply get rid of this regulatory framework. A nonprofit that receives a tax-deductible donation is getting an indirect government subsidy. The dollars that the Treasury loses to nonprofits must be made up through higher taxes on all of us. No one would argue that nonprofits should be able to do whatever they want with charitable donations.

Although regulation is necessary, this particular set of restrictions is strikingly discriminatory. No other sector of the interest group universe is as constrained in its advocacy as are 501(c)(3)s. This creates a huge imbalance. The so-called Gucci crowd on K Street can lobby as much as it wants and spend as much as it wants in representing trade associations or corporations before government. Yet, legally speaking, disability groups, hospices, community health centers and other 501(c)(3)s are regarded as something of a threat to the integrity of our political process. This is too large a price to pay for tax deductibility.

The lobbying restriction for nonprofits has its origins in Treasury Department regulations issued in 1919. Congress strengthened these regulations in 1934, adopting language that equated attempts to influence legislation with "carrying on propaganda." Included in the 1934 law, for the first time, was the stipulation that any nonprofit engaged in "substantial" lobbying could not retain its tax-deductible status. This law, with its definition of lobbying as propaganda, remains in effect today.

Many of our interviewees told us they believed that the IRS was vigilantly monitoring their political activity. On a number of occasions we heard the story of how the IRS busted the Sierra Club for its lobbying. The venerable environmental group infuriated a powerful member of Congress, Democratic Rep. Wayne Aspinall of Colorado, by taking out newspaper ads ridiculing a proposal to flood part of the Grand Canyon. The day after the ads ran, the IRS revoked the Sierra Club's tax-deductible status. Our respondents spoke knowingly of this episode, as if it happened recently.

It took place in 1966.

That the Sierra Club case still reverberates today is testament to how scared nonprofits are of the IRS. This is ironic because the modest, cobwebby Tax Exempt Office at the IRS hardly has the resources to engage in anything more than symbolic oversight of nonprofits. Contrary to what many nonprofit leaders believe, the IRS is not on the lookout for evidence of *any* form of lobbying. Only the visible signs of excessive lobbying -- activity that presents a challenge to the "substantial" standard -- has drawn the agency's interest.

If the IRS has a coherent strategy, it seems to be selective enforcement. Agency officials know that audits of a small number of nonprofits send shock waves throughout their larger communities. Most worrisome is that the office will undertake a review based on the complaints of an organization's rivals.

Compounding the problem of an ambiguous law and erratic enforcement is the passivity of nonprofit CEOs. By failing to learn the law, they are willing accomplices. Too often, when they do lobby, they pretend otherwise. One executive director told me that "We harass our state legislator all the time," while insisting that her organization did not belong in our study because "we are not involved in public affairs."

The irony in all of this is that there is a solution already in place that allows nonprofits to lobby without having to worry. In 1976 Congress passed a tax bill that included a specific accounting mechanism so that nonprofits no longer would have to guess what divides substantial from insubstantial lobbying. This much-needed alternative method was then, unfortunately, turned over to the IRS's Tax Exempt Office to implement. To call its pace in writing the regulations snail-like would be unfair to snails. It took 14 years before the office issued regulations.

The 1976 alternative, known as the "H election," is crystal clear in specifying the amounts that a nonprofit can expend on lobbying. Based on a sliding scale keyed to annual income, a nonprofit can spend up to as much as 20 percent of its revenues on lobbying. And because the regulations for the H election define lobbying rather narrowly, very little of what a nonprofit H elector does in its advocacy efforts counts as a lobbying expenditure. In short, it's difficult for a typical nonprofit to ever reach the H expenditure ceilings.

The H election is something of a stealth policy. Only about 2 percent of all 501(c)(3)s have chosen this option. When we asked the head of one statewide nonprofit association if he knew of the H election, his response was a common one. "I'm completely ignorant of it," he confessed.

So what's the catch? There isn't one, really -- only that the H election requires nonprofits to keep a record of their spending so they can prove they haven't exceeded the established limits.

The good news is that taking the H election could not be easier. Form 5768, which can be downloaded from the tax forms box at *http://www.irs.gov/*, only asks for an organization's name, address and a signature. It takes no more than 60 seconds to fill out. The IRS has also issued formal guidelines indicating that the H election is not a red flag for an audit and it appears to have kept its word.

Nonprofits are a lifeline for millions -- for battered women, immigrants, homebound senior citizens, AIDS patients, the 43 million Americans without health insurance and countless other constituencies who all too often fall through this nation's safety net. As government itself grows leaner, it is relying ever more heavily on nonprofits to do its work. From a standpoint of good government, the best policy would promote communication between government and its vendors.

Although it is legal for nonprofits to lobby under the "substantial" standard, it's clear that most are inhibited by it. By taking the H election, 501(c)(3)s can maintain their tax deductibility while becoming more aggressive on behalf of the disadvantaged segments of American society who come to them for social services and health care. It's unlikely, however, that the H election will ever become widely adopted without a firm push from the IRS. As a result, those most in need of a powerful voice in the political system will continue to receive the least representation. The obstacles created by Section 501(c)(3) aren't just bad public policy. They're unjust.

Author's e-mail:jeffrey.berry@tufts.edu
Jeffrey Berry is a professor of political science at Tufts University. He is the author (with David F. Arons) of the just-published "A Voice for Nonprofits" (Brookings Institution), from which this article is drawn.