



Policy Brief

Jeffrey M. Berry*

Expanding Nonprofit Advocacy

<https://doi.org/10.1515/npf-2020-0030>

Received January 2, 2020; accepted August 12, 2020

Abstract: Expanding Nonprofit Advocacy. This paper calls for regulatory changes that would clarify the rules around advocacy by 501(c)(3) nonprofits. It is common for leaders of such nonprofits to misinterpret these rules and to believe that they are much more restrictive than they really are. This results in less nonprofit advocacy and, consequentially, less representation of interests that are chronically underrepresented.

Keywords: lobbying, nonprofits, IRS, advocacy

1 Expanding Nonprofit Advocacy

The access of nonprofits to those in government is heavily structured by laws and regulations, especially those related to legislative lobbying. Section 501(c)(3) of the Internal Revenue Code says that nonprofits qualifying for tax deductible donations may not engage in a level of lobbying that reaches a “substantial” part of their overall activity.¹ In practice, many nonprofits interpret this stipulation incorrectly, believing that it is far more restrictive than it is in law.

It’s time for nonprofits to push the Internal Revenue Service to clarify sec. 501(c)(3) so that its restrictions on lobbying are spelled out in clear, common sense terms. As will be elaborated upon here, some simple administrative changes by the IRS could stimulate an expansion of lobbying by the nonprofit sector. And this expansion, in turn, will benefit those who are least represented in the governmental process.

¹ As used here the term “lobbying” refers to efforts to try to influence legislators. “Advocacy” refers to a broader range of tactics aimed at influencing government. Those nonprofits that do little or no lobbying because they believe their tax status restricts them, appear less likely to structure their organization in such a way to emphasize government relations.

*Corresponding author: Jeffrey M. Berry, Department of Political Science, Tufts University, Medford, MA, USA, E-mail: jeffrey.berry@tufts.edu

1.1 The Nature of the Problem

It's understandable that the IRS places some restrictions on nonprofits' political activity. Under sec. 501(c)(3) nonprofits are subject not only to an ambiguous limit on their lobbying but also to bans on endorsing candidates and contributing campaign funds. The rationale for these limits is that deductibility is a tax expenditure—essentially a subsidy provided by all taxpayers to cover the itemized deductions that some take for contributions to 501(c)(3) nonprofits. It is the vagueness of what constitutes a substantial amount of lobbying that bedevils nonprofits and, effectively, weakens the nonprofit sector by reducing its voice in public policymaking.

The evidence that confusion over regulatory standards weakens the nonprofit sector is strong. The most ambitious investigation of nonprofit advocacy is the Strengthening Nonprofit Advocacy Project (SNAP), undertaken by a partnership of Tufts University, OMB Watch, and Charity Lobbying in the Public Interest. This consortium ran a random sample survey of 990 tax filers which ultimately yielded data on 1738 nonprofits from across the United States. Interviews were also completed with the heads of 40 of these organizations and 25 additional interviews were done with experts on nonprofits. Finally, 17 focus groups with nonprofit CEOs and board members were conducted in a diverse set of U.S. cities (Bass et al. 2007; Berry and Arons 2003; Berry et al. 2003).

All three of our studies point toward the same conclusion: many, if not most, nonprofit leaders are misinformed about nonprofit law. In perhaps the most revealing part of the survey, respondents were given an eight part quiz on what the law actually says. Each of the eight statements asked if it is permissible for a 501(c)(3) nonprofit to engage in a particular activity. For example, can a nonprofit “support or oppose federal legislation under current IRS regulations?” Another asked the same, but of agency regulations rather than legislation. By and large the nation's nonprofit heads merited a failing grade on the quiz. On only three of the questions did at least two-thirds of respondents provide the correct answer. Remarkably, on two of the eight questions respondents did worse than they would have if they had merely flipped a coin to choose their answer. On the “support or oppose federal legislation under current IRS regulations” statement, barely half got the right answer. In other words, close to half of nonprofit leaders in the United States don't believe they have the First Amendment right to take a stand on a public policy question. And they do have a right to lobby under the law.

The quantitative data was buttressed by our interviews and focus groups. Most disheartening were the declarations of CEOs that the law forbade them from being involved in the governmental process. One executive told us confidently, “We're

not allowed to lobby. We're not allowed to influence public policy." Another said "I have to wait until a legislator contacts us." Of course, there are differences in the level of knowledge among all nonprofits. Large nonprofits such as universities and hospitals tend to be politically sophisticated and they are not held back in advocacy by a misunderstanding of the law. But mid-size and small nonprofits are much more prone to this kind of ignorance. And most nonprofits in the United States are modest in size and lack the sophistication that comes with increased scale.

Our most important finding is that ignorance of the law is linked to the lack of political representation of nonprofit clients and constituencies. Simply put, if a nonprofit's leadership believed that it was significantly limited or forbidden to lobby, then it was much less likely to do so. We ran a number of tests to measure this but one central approach was to compare conventional 501(c)(3)s with 501(c)(3) H electors. H electors are not bound by the vague substantial standard but, rather, are given a sliding scale of what percentage of their budget may be spent on both direct and grassroots lobbying. For example, small nonprofits (spending no more than \$500,000 a year), may spend up to 20 percent of their budget on legislative lobbying.

The comparison with H electors offers one piece of evidence as to how a different regulatory standard might impact the broader nonprofit sector. The H election standards are quite generous given what little activity must actually be expensed in accounting for lobbying. H electors are about 2.5 percent of all 501(c)(3)s and selecting the H option does not raise a red flag for the IRS; the agency does not audit them at a higher rate than other nonprofits. Conventional nonprofits did markedly less advocacy and, thus, they did less to represent those who use their services. In his meta-analysis of research on nonprofit advocacy, Jiahuan Lu concluded that "Our analysis points to a significant and positive association between a nonprofit's knowledge about laws and regulations and its level of participation in policy advocacy" (Lu 2018, 188S). The bottom line is that nonprofits serve their clients with dedication and passion, except when it comes to speaking to government on their behalf.

1.2 Leadership

The regulatory environment for nonprofits is, of course, but one factor responsible for the weakness of nonprofit advocacy. Most nonprofits are small organizations and their limited resources typically push advocacy far down the priority list. More broadly, they tend not to hire those with expertise in public policymaking and their overall capacity in terms of advocacy is usually limited. Nonprofits also find that funding sources are not interested in supporting advocacy. Government agencies

generally will not fund advocacy in the grants and contracts they extend to nonprofits, and foundations shy away from capacity building grants that involve advocacy, even though there is an easy workaround relating to restrictions in foundation law (Berry 2016). The organizational capacity of nonprofits is strongly linked to carrying out advocacy (Fyall and Allard 2017; LeRoux and Goerdel 2009).

Leadership within the nonprofit sector is another major factor underlying the lack of urgency on enhancing advocacy operations. Advocacy has never been a priority for leadership in the nonprofit sector and there does not appear to be anything on the horizon that would suggest a change of heart. There are some nonprofits that represent the interests of nonprofits, such as Independent Sector, which speak to the importance of the nonprofit role in the governmental process, but overall there is little voice on advocacy law under 501(c)(3). There are also state and local nonprofits, the Boston Foundation in eastern Massachusetts for example, which are active in training nonprofit leaders on advocacy law, strategy, and tactics. Generally, though, leadership in the nonprofit sector comes from trade groups aligned on the basis of issue area.

This failure of leadership is also amply illustrated by the response of the nation's largest foundations to the Trump administration's attack on policies and programs embraced by these foundations. In a study of the 20 largest foundations and another 20 sizable foundations drawn at random, Berry and Goss (2018) demonstrate a striking lack of response to the challenges presented by Trump. By way of context, 75 percent of the largest foundations have a liberal orientation and just one, Templeton, leans conservative. On issues like environmental protection, diversity, and access to health care, the administration aggressively began dismantling existing policy favored by liberals. And the response of these liberal foundations? Berry and Goss found timidity. These very large, prestigious foundations did not speak out, much less engage in active advocacy, during the period covered in the research (most of 2017). It was clear that there was a great deal of concern about violating regulations governing these types of nonprofits. It is also evident that this was an exaggerated fear.

The lack of commitment by leadership to move the nonprofit sector toward a more active advocacy orientation speaks to the importance of clarifying what conventional 501(c)(3) are permitted to do in terms of legislative lobbying. There have been many efforts to encourage nonprofits to become more active lobbying forces in public policymaking. But such hortatory approaches do not work and a different type of stimulus is necessary.

1.3 Policy Prescription

Three key administrative changes are at the heart of this proposal. The first is for the Internal Revenue Service to say clearly and emphatically that it is perfectly legal for nonprofits to lobby. Lobbying is a form of free speech and the IRS needs to say that. The initial regulations on nonprofit lobbying published in 1919 equated lobbying with disseminating “propaganda.” Even today the IRS communicates that lobbying is a suspect activity and this chills advocacy. Occasionally, the IRS investigates a nonprofit for alleged violations of the lobbying or political restrictions on 501(c)(3)s, as it did with the NAACP during George W. Bush’s administration. Although it rarely punishes a nonprofit for such transgressions, an investigation discourages advocacy by nonprofits that don’t have a good understanding of the law and fear having their tax deductibility revoked.

Second, it is important to define what constitutes lobbying. The ambiguities and carve outs make it difficult to understand the boundaries of permissible legislative lobbying in any precise way. If there is to be an expenditure test for conventional 501(c)(3)s, then lobbying efforts must be accorded values in basic accounting terms. Is *educating* legislators different than *lobbying* legislators? Is preparing a research study provided to legislators a lobbying expenditure distinct from time spent talking directly to them about the research?

The third change follows from the first two. Conventional nonprofits don’t know what the threshold is for substantial lobbying and are left in an uncomfortable void as to the limits of legislative advocacy. Yet, as noted earlier, there is a relatively clear set of expenditure limits on a sliding scale for H electors. It makes no sense for conventional nonprofits, which otherwise fall under the same guidelines for qualifying for tax deductible status as do H electors, to be subject to such completely different regulatory standards. Ideally, the IRS should make the H election the default in an application for nonprofit status; as it now stands such a choice requires a separate declaration. Alternatively, the IRS could provide a choice in the initial application and provide non-threatening guidelines for each in the accompanying instructions.

These changes clarify existing law and easily fall within the regulatory discretion given to the IRS by Congress to implement nonprofit laws passed over the years. Still, fashioning regulations on nonprofits and implementing them are two separate endeavors. Communicating new information about lobbying standards to the nation’s more than one million 501(c)(3) nonprofits is no small task.

As a practical matter, changes like these are only going to be issued under a Democratic administration. Republican administrations have been more concerned about constricting nonprofit advocacy, not expanding it, and only a

Democratic-led IRS regime would be interested both in the formulation and implementation of such regulations. Partisanship around the regulation of nonprofits has its origins in Republican administrations. Richard Nixon's IRS tried to curtail new applications for tax deductible status. From Ronald Reagan's Office of Management and Budget came a sweeping proposal to diminish nonprofit lobbying by creating a burdensome reporting requirement on expenditures of federal dollars.

One way of blunting conservative criticism is to make sure that churches are clearly identified as coming under these new regulations (Religious congregations have separate filing requirements with the IRS). Since an overwhelmed and underfunded IRS has other priorities, only limited resources could be committed to the implementation phase. Thus, nonprofit associations at the national, state, and local levels must provide the education and training required to make leadership and boards aware of these changes. This is challenging but doable as education and training constitute the *raison d'être* of these organizations.

Beyond the legalistic and administrative requirements is this reality: when it comes to advocacy, nonprofits function in a highly unlevel playing field. The lobbying world does not operate within a free marketplace of advocacy but, rather, in a regulated environment (Newmark 2020). Advocacy by various sectors of the organizational world is structured not merely by the large differential in available resources, but also by rules that establish under what conditions such resources may be utilized.

Nonprofit advocacy can and does work (Fisher 2019; Marwell 2004; Meyer and Tarrow 2018; Pekkanen, Smith, and Tsujinaka 2014). There is extensive research documenting the impact of various types of nonprofits that are not deterred by fear or misunderstanding of the regulatory environment (Bass, Abramson, and Emily 2014; Boris and Maronick 2012; Brown 2016; Mosley 2010, 2014). But the extent of such advocacy is far too limited and this seems unlikely to change under current rules. As a result the sector that ostensibly represents those who are frail, sick, homeless, discriminated against, don't speak English, are addicted, or mentally disabled, is subjected to restrictive rules governing access to policymakers. And that's not right.

References

- Bass, G. D., A. Abramson, and D. Emily. 2014. "Effective Advocacy: Lessons for Nonprofit Leaders From Research and Practice." In *Nonprofits and Advocacy*, edited by R. J. Pekkanen, S. Rathgeb Smith, and Y. Tsujinaka, 254–93. Baltimore: Johns Hopkins University Press.

- Bass, G. D., D. F. Arons, Guinane, K., M. F. Carter, and S. Rees. 2007. *Seen but Not Heard*. Washington, DC: Aspen Institute.
- Berry, J. M. 2016. "Negative Returns: The Impact of Impact Investing on Empowerment and Advocacy." *PS: Political Science & Politics* 49: 437–41.
- Berry, J. M., and D. F. Arons. 2003. *A Voice for Nonprofits*. Washington, DC: Brookings Institution Press.
- Berry, J. M., D. F. Arons, G. D. Bass, M. F. Carter, and K. E. Portney. 2003. *Surveying Nonprofits: A Methods Handbook*. Washington, DC: Aspen Institute.
- Berry, J. M., and K. A. Goss. 2018. "Donors for Democracy? Philanthropy and the Challenges Facing America in the 21st Century." *Interest Groups & Advocacy* 7: 233–57.
- Boris, E. T., and M. Maronick. 2012. "Civic Participation and Advocacy." In *The State of Nonprofit America*, edited by Maronick, M. and E. T. Boris, 394–422. Press, Washington, DC: Brookings Institution press.
- Brown, H. 2016. *Immigrants and Electoral Politics*. Ithaca, NY: Cornell University Press.
- Fisher, D. R. 2019. *American Resistance: From the Women's March to the Blue Wave*. New York: Columbia University Press.
- Fyall, R., and S. W. Allard. 2017. "Nonprofits and Political Activity: A Joint Consideration of the Political Activities, Programs, and Organizational Characteristics of Social Service Nonprofits." *Human Service Organizations: Management, Leadership and Governance* 41: 275–300.
- LeRoux, K. M., and H. Goerdel. 2009. "Political Advocacy by Nonprofit Organizations: A Strategic Management Explanation." *Public Performance and Management Review* 32: 514–36.
- Lu, J. 2018. "Organizational Antecedents of Nonprofit Engagement in Policy Advocacy: A Meta-Analytical Review." *Nonprofit and Voluntary Sector Quarterly* 47: 177S–203S.
- Marwell, N. P. 2004. "Privatizing the Welfare State: Nonprofit Community-Based Organizations as Community Actors." *American Sociological Review* 69: 265–91.
- Meyer, D. S., and S. Tarrow, eds. 2018. *The Resistance*. New York: Oxford University Press.
- Mosley, J. E. 2010. "Organizational Resources and Environmental Incentives: Understanding the Policy Advocacy Involvement of Human Service Nonprofits." *Social Service Review* 84: 57–76.
- Mosley, J. E. 2014. "From Skid Row to the Statehouse: How Nonprofit Homeless Service Providers Overcome Barriers to Policy Advocacy Involvement." In *Nonprofits and Advocacy*, edited by R. J. Pekkanen, S. Rathgeb Smith, and Y. Tsujinaka, 107–34. Baltimore: Johns Hopkins University Press.
- Newmark, A. J. 2020. "Regulating Lobbying in the United States." In *Interest Group Politics*, 10th ed., edited by A. J. Cigler, B. A. Loomis, and A. J. Nownes, 229–44. Lanham, MD: Rowman & Littlefield.
- Pekkanen, R. J., S. Rathgeb Smith, and Y. Tsujinaka, eds. 2014. *Nonprofits and Advocacy*. Baltimore: Johns Hopkins University Press.