

Nonprofit Lobbying and Grants: Strategies for Success Amidst the Controversy

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Abstract

Should nonprofit organizations that receive government grants be permitted to lobby? This paper will contend that the answer is a resounding yes. Nonprofit organizations (NPOs) need to engage in lobbying activities to advocate their missions on behalf of their members, the public at large, and effectively influence the public policy process. There is a great deal of controversy surrounding this subject. Some – including members of Congress – believe that it is wrong for organizations that receive government money in the form of grants to use these funds to advocate their special interests. The opponents to lobbying by nonprofit organizations that receive government funds refer to these activities as “welfare for lobbyists” and contend that taxpayers are unwillingly supporting organizations whose missions are contrary to their personal beliefs. The following discussion will explore this controversial issue and offer a solution as to how an NPO can effectively – and legally – advocate on behalf of its mission.

I. Introduction

One of several NPOs that has received criticism for its lobbying activities is the National Fish and Wildlife Foundation (NFWF), a tax-exempt charitable organization under the Internal Revenue Code Section 501(c)(3) category. Due in part to some questionable business practices and the resignation of one of its board members in 1992, the NFWF has been under scrutiny for several years and is used by opponents as an

example of why NPO grant recipients should not be permitted to influence the legislative process by engaging in lobbying activities.

Before we discuss specifics regarding the NFWF, it would be helpful to first examine the issue of lobbying in general as well as the laws and rules that govern lobbying by NPOs.

A. History of NPO Lobbying in America

As far back as the 17th century, there have been clashes between citizens' groups and politicians. One such conflict occurred in Massachusetts, when Harvard leader Increase Mather fought to have the college come under church control rather than political control. In the 18th century, French writer Alexis de Tocqueville commented on the zeal of Americans to form associations and urged government to have a "hands-off" approach. Beginning in the 1950s, the Internal Revenue Service (IRS) began to promulgate regulations that would apply to tax-exempt NPOs. In the 1960s, Congress made adjustments to the tax law which prohibited lobbying by private foundations and established financial reporting requirements (CQ, 1139-1140).

Besides revisions to the tax law, the first major lobbying measures by Congress occurred in 1976, when legislation was passed (the regulations did not come into effect until 1990) requiring 501(c)(3) NPOs to choose one of two options: either 1) claim "insubstantial lobbying", which would refer to a specific percentage of their total budgets; or 2) choose to have fewer lobbying restrictions but detailed IRS expenditure limits to follow. Under the "insubstantial lobbying" claim, there is a requirement that "no substantial part of the activities' of the organization may constitute 'carrying on propaganda, or otherwise attempting, to influence legislation'" (Hopkins 201). Naturally,

determining whether an NPO has spent a “substantial” part of its activities on lobbying was difficult using this ambiguous definition. One thing the 1976 law was clear on, however, is that private foundations are not permitted to lobby at all. [More discussion of the laws and regulations applicable to lobbying by NPOs follows below.]

B. Definition of Lobbying

There are two types of lobbying: grassroots and direct. Grassroots lobbying “refers to any attempt to influence legislation through an attempt to affect the opinion of the general public” (Smucker, 51). In addition, the 1976 law specified that the total amount of an NPO’s grassroots lobbying activities may not exceed 25% of the total allowable lobbying expenditures for that year. Direct lobbying “...occurs when the organization urges the public, or a segment of the public, to contact members of a legislative body or their staffs for the purpose of proposing, supporting, or opposing legislation” (Hopkins, 202). Some lobbying can be said to have a “dual character”, which means that grassroots lobbying has also been tied to political candidate campaigns. 501(c)(3) organizations are not permitted to “support, participate, or intervene in any election for public office” (Overton 71).

In examining the basic rules regarding lobbying, it is important to also note the difference between lobbying and advocacy. Advocacy is defined as an organization taking a policy position or action; it may involve litigation, demonstrations, and other activities which may include lobbying. Lobbying in itself simply refers to an attempt by an organization to influence the legislative process, whether by direct or indirect means. Advocacy takes a more indirect approach to the public policy process, and typically involves more educational outreach than politics.

C. Laws and Rules that Apply to NPO Lobbying

There are three main sets of guidelines for a nonprofit to adhere to when devising policies on lobbying: 1) IRS regulations; 2) Office of Management and Budget (OMB) requirements; and 3) legislation.

IRS Regulations

First, every NPO should know that lobbying is legal. Second, the NPO should know the limitations on lobbying amounts set by the IRS. As indicated in a June 26, 2000 interpretive letter to the NPO group Charity Lobbying in the Public Interest, the IRS discussed the two lobbying options for public charities (other than private foundations and churches which are subject to different requirements) set forth in the 1990 regulations. In this letter, the IRS admits to the ambiguity of the “insubstantial part” rule and seems to suggest that it would be preferable for a 501(c)(3) to elect to come under the 1976 lobby law and thereby choose to follow the expenditure test. In doing so, however, it must take into account that the expenditure test places ceilings on the amount of funds that can be spent on lobbying (Miller, 2000). The essential rules of the expenditure test are that an NPO can spend up to 20% of its first \$500,000 of annual expenditures, 15% of the next \$500,000, and 10% of the next \$500,000, up to one million dollars (Smucker 115).

An exception to these limitations can be found in Section 501(h) of the IRS tax code, known as the “safe harbor” provision. If an organization chooses to file a special election under this provision, this will “allow them to spend up to a specified dollar amount (which may represent a larger percentage of total activities) for lobbying without fear of adverse tax consequences from such activities...isolated instances of lobbying in

excess of permissible amounts will not cost the organization its tax exemption. Instead, an excise tax will be applied against the organization” (Overton 70). While the safe harbor provision may provide an NPO with some respite in case of accidental lobbying expenditure overruns, the penalties are strict and put the NPO at substantial risk for costly taxes.

OMB Requirements on Lobbying and Federal Grant Recipients

OMB has put audit requirements in place that are supposed to prevent grantees from using those federal funds to lobby. For example, OMB Circular A-122 “prohibits the use of federal funds for carrying on political and lobbying activities” (1984). OMB Circular A-110 requires that “financial records, including supporting documentation, must be maintained for a minimum of three years from the completion of the award and be made freely available to the awarding agency, the Inspector General, and the Comptroller General” (2002). In 1990, OMB placed stricter auditing restrictions on NPOs that spend “more than \$300,000 in federal funds to contract with an independent certified public accountant...to carry out an independent and comprehensive audit of the organization’s books and of its compliance with federal financial and program requirements” (OMB, 1990). OMB also established sanctions for NPOs that violate the rules of lobbying in regards to federal funds.

Legislation

There are numerous laws that impact NPO lobbying. In 1987, Congress passed the Tax-Exempt Organizations’ Lobbying and Political Activities Accountability Act, which was meant to distinguish, in legal terms, the difference between lobbying and politics and permit the IRS to levy fines against those in noncompliance with lobbying

expenditure limits. The “Byrd Amendment” “prohibits the use of federal funds received as grants, contracts, loans, or pursuant to cooperative agreements for attempts to influence an officer or employee of a governmental agency in connection with the awarding, obtaining, or making of any federal contract, grant, loan, or cooperative agreement” (Hopkins, 212). A significant piece of NPO lobbying legislation was the Lobbying Reform Act of 1995. The Lobbying Reform Act included the “Simpson Amendment” (introduced by Senator Alan Simpson from Wyoming) which “forbids all lobbying activities by nonprofit corporations that are organized under Section 501(c)(4) [(social welfare organizations)] of the IRC Code and that receive federal funds” (Moody, 2).

II. History

Organization Information

The NFWF, with headquarters located at 1120 Connecticut Avenue, N.W., Washington, D.C., and several regional offices, is a 501(c)(3) organization that was created by Congress in 1984. The mission of the NFWF is “to conserve healthy populations of fish, wildlife and plants, on land and in the sea, through creative and respectful partnerships, sustainable solutions, and better education...The Foundation awards funds to projects benefiting conservation education, habitat protection and restoration, and natural resource management” (2002).

The NFWF receives all of its funds from individual contributions and grants. The NFWF is governed by a fifteen-member bipartisan board of directors appointed by the Secretary of the Interior. The board members are not financially compensated for their participation; in fact, the directors make financial contributions to the Foundation. The

NFWF is managed by a Chief Executive Officer and a Chief Financial Officer. The NFWF has approximately 50 employees and no volunteers. According to the NFWF's Form 990, the organization received \$28,837,299 in public contributions and \$22,433,919 in government grants in calendar year 1999. Total revenue for that year was reported as \$57,142,488, and total expenses for 1999 were \$49,996,174. Of the total expenses, \$47,922,561 was spent on program services, and \$888,898 was spent on fundraising activities.

The Foundation awards grants to educational institutions, conservation organizations, and government agencies. The Foundation "has made more than 4,400 grants, committing over \$165 million in federal funds, matched with non-federal dollars, delivering more than \$500 million for conservation" (NFWF, 2002). The Foundation prides itself on fostering partnerships among government, private foundations, corporations, individuals, and other NPOs.

The Problem

The NFWF claims – in public statements and on the Form 990 – that it does no lobbying. Even though the NFWF could legally elect to come under the 1976 lobbying law or choose to follow the "insubstantial test", the NFWF claims to do neither. Despite this assertion, the Foundation has found itself in the middle of a controversy concerning its lobbying activities.

Once Republications began to take over Congress in the early 1990s, debate over lobbying by NPOs – particularly those that receive government grants – increased. Opponents of NPO lobbying claimed that grant money is fungible – and that NPOs were in fact using federal funds to lobby Congress for more money. To respond to this

growing concern, the House Committee on Government Reform and Oversight, Subcommittee on National Economic Growth, National Resources and Regulatory Affairs, held a hearing in June 1995 to address the issue of lobbying by groups receiving federal funds. Congressman David McIntosh, a Republican from Indiana, opened the hearing with talk of “one of Washington’s best kept little secrets, welfare for lobbyists... Your tax dollars are being used by special interest groups to lobby Congress for more tax dollars” (Congressional Hearing Transcripts, 1998). Rep. McIntosh continued to discuss the alleged lobbying abuses of NPOs that receive government grants, and mentioned the National Fish and Wildlife Foundation as one of the culprits. In both written and oral testimony, he claimed

In another example, the National Fish and Wildlife Foundation...receives \$7.5 million in grants from the federal government, much of it from Secretary Bruce Babbitt’s Interior Department. Although the Foundation tries to follow an internal rule that prohibits it from lobbying, as you can see from this internal memo we obtained, Interior Secretary Babbitt recently pressured the Foundation’s Board of Directors to lobby Congress to prevent the budget cuts at the National Biological Service. We have asked the Foundation to tell us whether any of its board members followed Mr. Babbitt’s instructions, but we have not received an answer. I hope we will get one today. Just yesterday, a former member of the board, Mr. Steve Robinson, advised us he resigned from the board in December of 1992, quote, ‘as a result of the Foundation’s involvement in political advocacy and outright lobbying’ (1998).

At the hearing, there were heated arguments on both sides of the issue by invited participants and members of the Subcommittee. Then Executive Director of the NFWF, Amos Eno, defended his organization by stating that “None of our federal funds are used for lobbying...In fact, the Foundation does not lobby. We do not allow grant recipients to use federal funds or even privately generated matching funds for lobbying” (1998). Mr. Eno also pointed out that the Foundation has strict financial reporting requirements and is subject to an annual audit. In addition, the Executive

Director claimed that the NFWF had undergone an audit by the Inspector General of the Interior Department in 1993 and “passed with flying colors”.

III. The Outcome

Due to this controversy, there have been several initiatives by Republican members of Congress to severely restrict, or eliminate altogether, lobbying by NPOs that receive federal grants.

Congressman Ernest Istook has proposed several different amendments that would “cut off federal funds to all federal grant recipients, including nonprofit organizations organized under both Section 501(c)(3) and Section 501(c)(4) of the Internal Revenue Code, that engaged in ‘political activity’” (2). None of these amendments have yet been enacted into law.

In June 2002, the Senate Finance Committee approved a bill (the “CARE Act of 2002”) containing a provision that would simplify lobbying rules for charitable organizations. The language in the bill would eliminate the current restrictions on grassroots lobbying (25% of the total lobbying budget), providing charitable organizations with the option of spending their total lobbying budget on direct lobbying, grassroots lobbying, or a combination of the two. [Before becoming law, of course, the legislation will have to be approved by both the Senate and House prior to going to the President for signature.] Senator Phil Gramm (R-TX) threatened to counteract that proposal, however, with an amendment that would ban all lobbying by charitable organizations – not just those that receive federal grants. In the end, he decided not to introduce the amendment, but his actions indicate that the controversy surrounding the issue of NPO lobbying still exists, and additional proposals could emerge at any time.

IV. Theory in Practice

A. Why Do/Should NPOs Lobby?

There is ample evidence that NPOs play a vital role in the formulation of public policy. Many NPOs were created due to the pressing needs of society for services that the government could not, or would not, provide. An essential part of fulfilling an NPO's mission is in advocating positions on issues and seeking policy that addresses the needs of its membership and/or the public at large. Government agencies develop regulations that are to execute the intent of Congress, as indicated in legislation. Because of this fact, an NPO would be remiss in omitting the legislative branch from its efforts to make a positive difference for those they serve. Lobbying is a necessary evil. Even though it is often a game of political connections and motives, those that don't play will be left out of the tournament. The tournament, of course, is equitable policy that benefits the public and not just those with the financial resources and power to influence others. The First Amendment to the Constitution provides for freedom of speech and the right of people to peacefully assemble. Those rights are fundamental to the role of NPOs in our society. In the world of money and power, NPOs are often the final refuge for those in need – of not just services, but of a voice to those that can make a difference. Because charitable NPOs have no financial or commercial gain in public policy they are very important. Democracy demands that all who want to have a means by which to express themselves. Lobbying is an important part of the democratic process and what makes America great.

B. The Root of NFWF's Problems

As we have also learned this semester, governance is the foundation from which all NPOs are either strongly built or weak and unstable. In regards to lobbying, the NFWF was definitely the latter.

The main – and actually the sole – issue at the heart of NFWF's problems was lack of understanding or ignorance of the laws (described in detail above) that govern the lobbying requirements of NPOs that receive government grants. This fact points to the lack of, or ineffective, board oversight and extreme negligence on the part of the NFWF's Executive Director. It appears as though the board was “disengaged” and did not take its responsibilities and legal obligations seriously. The Foundation has at least one employee that deals with government affairs issues, and at least one attorney. The governmental affairs representative should have a good understanding of what constitutes lobbying, and in-house legal counsel should know the laws that govern NPO lobbying. If an NPO knows the laws and rules, it would not have to be concerned about losing its tax-exempt status. NFWF's lack of understanding of these laws and rules prevented it from fulfilling its responsibility related to its important role in public policy. This put the NFWF in the middle of a controversy they could have avoided.

In addition to lack of knowledge regarding lobbying laws and rules, there was also an evident communications breakdown and lack of information-sharing or benchmarking. In our class discussions, we have learned in detail how crucial it is to have an informed board. It appears from this case that the Executive Director did not communicate lobbying issues to the board for its consideration. It is also clear that the Foundation did not speak to other NPOs that receive government grants who have

effectively addressed this issue, such as the Nature Conservancy and the American Association of Retired Persons (AARP).

Referring to Terry Cooper's discussion of ethics in public administration in his book The Responsible Administrator, it is also evident that an ethical code of conduct was not in place. If an ethical code of conduct had been developed, issues regarding lobbying would have been addressed and perhaps Steve Robinson would not have resigned from the board. The ethical as well as legal issues concerning NPO lobbying would have been raised and addressed and a policy put in place that would obviate the need for extreme actions such as those that occurred.

Also referring to Cooper, it was evident that the NFWF's management did not use an ethical decision-making framework to consider the issue of lobbying. As we learned in class, boards govern and staff manage. Why didn't Executive Director Eno carefully examine this issue and how his organization was ethically responsible for participating in lobbying activities? Using a framework such as Cooper's it is obvious that there are many ethical principles at stake: 1) responsibility - to the public and NFWF's supporters; 2) fairness - why should trade associations lobby without restrictions while public charities remain silent? What about the corporations such as Lockheed Martin that receive billions of dollars a year in government contracts and have absolutely no limits relative to legislative advocacy?; 3) beneficence - doing the charitable good, which would require advocating on the public's behalf in all branches of government; 4) justice – lobbying keeps politicians informed and educates them on important issues; and finally, 5) duty – it is the NFWF's duty to fulfill its mission and represent the wishes of the public for whom the organization was created. The NFWF clearly neglected its duties.

Had the NFWF used a framework to evaluate all possible alternatives and consequences, the answer would have been clear: the Foundation is not only legally permitted to lobby, but the Foundation is ethically required to lobby.

V. Recommendations

There are a lot of options that the NFWF could have chosen to effectively advocate its mission and fulfill its ethical obligations to those it serves.

Research and Guidance

First, the Foundation should research the laws and rules that apply to NPO lobbying, as outlined above. Once this has been done, brief and easy-to-follow guidelines regarding these rules and laws should be put together for Foundation staff, board members, and partners. An efficient way to deal with this would be to create a notebook using a three-ring binder to distribute to board members, employees and partners that could be updated as necessary. There should be recurring training for new employees and board members, and brief updating sessions following new legislation or regulations. The board should formulate a policy regarding lobbying and put it in writing so there are fewer questions and ambiguities. Once these guidelines have been established, detailed records should be kept. Requiring staff to keep track of time spent daily on lobbying activities would provide more accurate and easily assembled information.

Elect To Come Under the 1976 Lobbying Law

Basics aside, the NFWF should elect to come under the 1976 lobbying law. To do this, all that is required is to get the approval of the board and file form 5678 with the IRS.

Form an Affiliate Organization

As mentioned above, there are two large, successful NPOs - that also receive government grants - that have effectively dealt with the lobbying issue and resulting controversy: The Nature Conservancy and the AARP. Both of these NPOs have developed affiliate organizations (which they must acknowledge on their form 990), one to effectively lobby and one to receive government grant money without a perceived conflict of interest. A 501(c)(3) organization may receive tax-deductible donations but cannot directly lobby or support candidates. A 501(c)(4) organization does not have any lobbying restrictions but cannot offer tax-deductible contributions. A constructive solution is to establish one of each.

The Nature Conservancy, a 501(c)(3) organization, offers its members tax-deductible contributions and also receives government grant money. The Nature Conservancy, as reported on its form 990, does not lobby. The Nature Conservancy has an affiliate organization, The Nature Conservancy Action Fund, which is a 501(c)(4) organization. The Nature Conservancy Action Fund does not receive government grant money, does not offer tax-deductible contributions, but does lobby aggressively without restrictions.

The AARP is a 501(c)(4) organization. The AARP does not receive government grants, cannot offer tax-deductible contributions, but does engage in lobbying activities. The AARP Foundation, however, is a 501(c)(3) nonpartisan, charitable corporation, that was established to administer the millions of dollars the Foundation receives a year in federal grants. In essence, as described by Hopkins, “A charitable organization can create a related social welfare organization and use it as a lobbying arm” (209). Social

welfare organizations are also permitted to establish Political Action Committees. Naturally, this strategy has generated controversy and accusations of deception. It is important to note, however, that the Supreme Court has ruled in favor of having affiliate 501(c)(3) and 501(c)(4) organizations, declaring that this is not in violation of the Constitution.

Other Avenues to Explore

The NFWF prides itself on its partnership efforts. Why, then, don't they utilize volunteers? Using volunteers to lobby has two main benefits: 1) members of Congress place a great deal of focus on the concerns of their constituents; and 2) unless there are specific expenditures (such as cab rides, etc.), volunteer activities do not count towards lobbying reporting requirements.

In addition, the NFWF should join other associations and have them lobby for common interests. There's power in numbers. Coalition work is also important. The NFWF should mobilize other NPOs to work towards common goals.

VI. Conclusion

Lobbying is an essential part of the NPO's role in the public policy process. NPOs were created to serve the interests of those that cannot represent themselves, or choose not to for various reasons. It has been said that government sees NPOs as more threatening than businesses because they are not motivated by profit. As long as government is largely controlled by Republican and conservative interests, initiatives will continue to be undertaken in Congress to place stricter controls on NPO lobbying activities or perhaps eliminate the rights of NPOs to engage in legislative advocacy

altogether. It is because of this fact that NPOs need to be informed, mobilized, and relentless in their pursuit of the common good.

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