

REALITIES AND AN ALTERNATIVE

Responding to Rosemary E. Fei and Eric K. Gorovitz, Practitioner Perspectives on Using § 501(c)(4) Organizations for Charitable Lobbying

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Better the devil you know than the devil you don't.

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INTRODUCTION

In their article on nonprofit lobbying, Rosemary Fei and Eric Gorovitz provide a terrific guide to the choices, obstacles, and available structures for lobbying by public charities. The article represents a tremendous addition to the literature in the field. As the authors point out on the first page of the paper, “The biggest barriers to [charities’] participation [in lobbying activity]. . .[are] lack of resources and limited staff expertise” and a general misunderstanding of restrictions imposed by federal law.¹ The publication of the article will help to inform charity staff and to clear up the misunderstandings surrounding the perceived restrictions on lobbying that chill lobbying activity by charities.

This response will focus on two topics. First, it will seek to answer the question of what the goal with respect to nonprofit legislative speech should be, based on policies and legislative history of the current statutory and regulatory regime. In other words, in an ideal world, would charities be permitted to engage in legislative activities, and if so, to what extent? Second, this response will address different mecha-

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1. Rosemary E. Fei & Eric K. Gorovitz, *Practitioner Perspectives on Using § 501(c)(4) Organizations for Charitable Lobbying: Realities and an Alternative*, 21 N.Y.U. J. LEGIS. & PUB. POL’Y 535 (2018).

nisms for attaining that goal, including the current legal regime for nonprofit lobbying, a modified version of the current regime, and the Separate Segregated Lobbying Fund (SSLF) suggested by Fei and Gorovitz.²

I.

GOAL AND BACKGROUND

The authors' goal for the charitable sector with respect to lobbying would be to increase lobbying and remove real and perceived obstacles to legislative activity, and I wholeheartedly agree with the authors. In my view, public charities should have the right to engage in virtually unlimited lobbying, as long as the lobbying furthers the exempt purposes of the organization. In other words, mission-related lobbying should be viewed as a charitable activity.

The policy reasons to support this conclusion far outweigh the counterarguments. First, public charities can be effective and efficient vehicles for the public's participation in formulating public policy and the laws embodying that policy. Second, rigorous debate is good for democracy, regardless of what is being debated or who is doing the debating. Letting public charities lobby and campaign increases the number of voices in the discourse and generally allows voices otherwise underrepresented in legislative discourse to participate. And third, the right of citizens to petition the government is fundamental to our notion of democracy. Depriving public charities of that right seems downright undemocratic.³ Of course, permitting private foundations to engage in legislative speech would not achieve the same goals,⁴ and I agree with the authors' conclusion that the right to engage in lobbying directly should not be expanded to private foundations.

Aside from these policy considerations, it is clear, based on legislative history, that Congress was not concerned about lobbying by

2. *Id.* at 572-82.

3. Jill S. Manny, *Nonprofit Legislative Speech: Aligning Policy, Law, and Reality*, 62 CASE W. RES. L. REV. 757, 783-84 (2012); see also Laura B. Chisolm, *Exempt Organization Advocacy: Matching the Rules to the Rationales*, 63 IND. L.J. 201, 244-246 (1988); Lloyd Hitoshi Mayer, *What Is This Lobbying That We Are So Worried About?*, 26 YALE L. & POL'Y REV. 485, 539-40 (2008).

4. Private foundations, defined in I.R.C. § 509(a), generally are funded and controlled by a family or other small group or by a corporation, and therefore are not dependent on or accountable to the public.

public charities generally, but rather was concerned about selfish lobbying by charities.⁵ So why should unselfish lobbying be limited?

There are other authorities, as well, that suggest that lobbying by public charities should be permitted as an unlimited charitable activity. For example, it is troubling that, although the Treasury Regulation defining “charitable” for purposes of Internal Revenue Code (“Code”) § 501(c)(3) includes “promotion of social welfare” as a charitable activity,⁶ and social welfare activity, for purposes of § 501(c)(4), includes lobbying,⁷ lobbying is not considered a promotion of social welfare activity for purposes of § 501(c)(3). This inconsistency is difficult to explain from a policy perspective.

Finally, in addition to the normative reasons, there are practical reasons to expand the abilities of charities to lobby. For example, §§ 501(h) and 4911 create an alternative test for limiting lobbying by public charities, based solely on dollar limitations. That test, known as the “expenditure test,” was enacted in 1976, when the world was a different place because the internet did not exist. Today, however, the ability to use the internet to influence the public—and perhaps Congress, as well—on legislative matters renders the dollar limitations imposed by the expenditure test useless in many cases. Given that well-counseled electing public charities now can engage in virtually unlimited lobbying on the internet without significant expenditures, it is hard to imagine what the point of the limitations might be, except to punish organizations that are unable to afford skilled legal counsel.⁸

II.

REACHING THE GOAL

Now that we have identified the goal of increased lobbying by public charities, the question is how to reach that goal. Two possibilities for achieving that goal are either (1) to use existing options or (2) to create a new type of entity to encourage legislative activity in the charitable sector. Fei and Gorovitz suggest the second option—the creation of a new type of structure, the SSLF.⁹ I prefer a third option: modifying current law to increase the ability of charities to lobby in support of their missions without meaningful limitation.

5. See Manny, *supra* note 3, at 764-65; *see also* Mayer, *supra* note 3, at 499-500 (concluding that Congress believed lobbying by charities should be restricted to prevent abuses, not prohibited outright).

6. Treas. Reg. § 1.501(c)(3)-1(d)(2) (as amended in 2017).

7. *Id.*

8. *See* Manny, *supra* note 3, at 781.

9. Fei & Gorovitz, *supra* note 1 at 572-82.

Fei and Gorovitz expertly outline the current options for lobbying in the nonprofit sector: namely, using a § 501(c)(3) public charity, using a § 501(c)(4) social welfare organization, or using a public charity/social welfare organization “tandem structure.” Their article perfectly presents the benefits and burdens of each possibility.¹⁰

Using a public charity rather than a social welfare organization for lobbying purposes has several significant benefits. Public charities generally qualify as eligible donees under § 170,¹¹ which makes fundraising from itemizers and private foundations easier. In addition, the “halo effect” that attaches to public charities also may make donors, including governments, more generous. Finally, public charities¹² can elect to use the objective “expenditure test” rather than the subjective “substantial part” test to measure permissible lobbying expenditures, enabling many public charities to engage in virtually unlimited legislative activities.¹³

The burden for charities wishing to lobby in furtherance of their missions is potential limitations on lobbying under either test, and massive confusion on the amount of permissible lobbying under either test. Social welfare organizations, on the other hand, benefit both from a total lack of restriction on lobbying activity and from the ability to engage in some “insubstantial” political campaign activity. The burdens for social welfare organizations are the inability to offer their donors a charitable contribution deduction and more red tape for private foundations inclined to donate to their causes.

Using a tandem structure with a public charity and a social welfare organization working together delivers benefits of both § 501(c)(3) and § 501(c)(4) status but brings burdens of its own. As Fei and Gorovitz point out, the tandem structure has the “ability to deliver both the benefits of a charity and the expanded advocacy capabilities of a social welfare organization.”¹⁴ It also provides economic efficiencies because “operating two entities in tandem is generally less expensive than operating two entities completely independently.”¹⁵ Since tandem organizations can share staff, offices, and other resources, operating in tandem can offer economies of scale to reduce costs for the charity and the social welfare organization. In addition, if a charity has a § 501(h) election in effect, it can combine lobbying

10. *Id.*

11. I.R.C. §§ 170(c)(2), 501(c)(3) (2012).

12. Excluding churches.

13. *See* Manny, *supra* note 3, at 780-82.

14. Fei & Gorovitz, *supra* note 1 at 561.

15. *Id.* at 561-62.

efforts by essentially hiring its tandem social welfare organization to do its lobbying up to its expenditure test limits for the year, reducing lobbying costs and increasing efficiency. The authors point out several burdens of maintaining a tandem structure, including the need to construct and secure boundaries between the affiliates and to properly allocate expenses between the affiliates to avoid comingling of deductible and nondeductible contributions.¹⁶ In addition, the authors have encountered governance issues to ensure preservation of shared purpose and vision.¹⁷

Fei and Gorovitz suggest that these existing options are not ideal and support instead the creation of the SSLF, a new structure for non-profit lobbying that aims to preserve the benefits of the currently available structures while avoiding the burdens of those structures. I am not convinced that the SSLF accomplishes this goal. Rather, the SSLF seems to lose a primary benefit of lobbying within a § 501(c)(3) public charity—the ability to lobby with deductible contributions—and to lose a primary benefit of lobbying within a § 501(c)(4) social welfare organization—the ability to engage in some political campaign activity.

Further, Fei and Gorovitz claim that using an SSLF will be administratively easier than using a tandem structure,¹⁸ but it seems to me that the same type of complicated allocations of expenses will be required to properly charge lobbying expenses to the SSLF, and the same burden that arises in the tandem structure will arise in constructing and securing the boundaries around the SSLF. Whether the SSLF is a separate fund or a separate entity, its funding will come from nondeductible contributions and will have to be carefully segregated from funds of its parent § 501(c)(3) organization, at least for tax purposes. In addition, use of the SSLF will not reduce paperwork, as filing a separate 990 adds administrative burden and expense.

And there are other unappealing aspects to the creation of a new and untested structure. The SSLF structure seems quite rigid, unlike the tandem structure, in that the SSLF can only carry on lobbying activities. Furthermore, there are inherent risks in asking the Internal Revenue Service (“IRS”) to bless a new type of entity. We know how the tandem structure works, and that provides comfort to many. When you open a Pandora’s Box, it is difficult to predict what will emerge. The SSLF seems to be a complicated mechanism and less beneficial than other options. Since Fei and Gorovitz agree that the complexity

16. *Id.*

17. *Id.*

18. *Id.*

of the § 501(h) election to use the expenditure test chills lobbying activity by charities,¹⁹ encouraging the enactment of a brand new, unfamiliar, and complex structure would seem almost certain to confuse organizations and their attorneys, exacerbating rather than eliminating the chill of misunderstanding.

The authors confess that most organizations can satisfy their lobbying needs without exceeding limits under either the substantial part test or the expenditure test, depending on the size of the organization.²⁰ They further conclude that setting up a § 501(c)(4) social welfare organization in a tandem structure will help with both overflow lobbying and with political activities for charities.²¹ In the grand scheme of things, statistics suggest that not many social welfare organizations engage in lobbying,²² so it seems that the SSLF will be useful only to a handful of charitable organizations with excess lobbying expenditures and no interest in political campaign activities. In trying to pinpoint which organizations might fall into that category, I would think it would comprise organizations that do not seek to engage in any political campaign activity, but that instead wish to engage in extensive grassroots lobbying (as opposed to direct lobbying²³) that they cannot accomplish on their websites within the § 501(h) expenditure limits.²⁴ It seems like a lot of effort to legislate for, learn about, and implement a brand new set of rules likely not to be used by many organizations.

In light of the burdens that might arise with the adoption of SSLF legislation and the limited utility of the SSLF, it appears that the tandem arrangement described in the article offers more benefits and flexibility, and fewer burdens and complications, than the SSLF. If an organization is forced to lobby with nondeductible contributions, it might as well use a well understood social welfare entity, rather than a completely new and unknown entity, and have the right to campaign as well.²⁵ Better the devil you know than the devil you don't.

19. *Id.*

20. *Id.*

21. *Id.*

22. Ellen P. Aprill, *Examining the Landscape of § 501(c)(4) Social Welfare Organizations*, 21 N.Y.U. J. LEGIS. & PUB. POL'Y 364 (2018).

23. Because of the lower caps on grassroots lobbying as compared to direct lobbying under I.R.C. § 501(h).

24. Website lobbying is quite inexpensive so it is hard to imagine any organization with a website that would confront this issue.

25. The I.R.C. § 170 deduction is less of an incentive to donors than it once was.

III.

TWEAKING THE LAW TO REACH THE GOAL

Returning to the shared goal of permitting unlimited (or at least extensive) unselfish lobbying by public charities, I conclude that the tandem structure remains the best vehicle to achieve that goal, particularly if the § 501(h) election can be tweaked to bring it into the twenty-first century and avoid some of the burdens that Fei and Gorovitz point out. The system is not broken, so fixing it by adding a new and unfamiliar alternative will only cause confusion, complication, and unintended consequences and will, quite likely, further chill rather than encourage legislative activity by charities. Furthermore, getting new legislation through Congress at this point seems unlikely—facilitating and encouraging nonprofit lobbying is likely not high on the list of legislative priorities at the moment. Even a § 501(h) tweak is a long shot, but that is still more likely to succeed than brand new legislation for the SSLF.

The combination of a § 501(h) election to use the expenditure test for a § 501(c)(3) charity with a tandem § 501(c)(4) entity (if necessary) can permit significant—perhaps virtually unlimited—lobbying by public charities to the extent of their aggregate available funding. The expenditure test therefore provides a terrific tool for extensive lobbying in the nonprofit sector, and the tool could be advanced by tweaking the rules under §§ 501(h) and 4911 to improve the tool.

The expenditure test's primary difficulties are its over-complexity and its primordial dollar limitations. The test was enacted in 1976 and the world has changed quite a bit in the ensuing forty years. First, the World Wide Web was not around in 1976. Lobbying required drafting, printing, posting, stamping, and mailing letters, brochures, flyers, and pamphlets, and significant travel. In other words, lobbying required lots of money. Today, organizations can lobby virtually for free on the internet and use email to correspond with legislators and constituents.²⁶ New technology makes it possible to schedule “virtual meetings” with legislators at little or no cost. Organizations that lobby through the internet and other modes of digital communication can reach millions, perhaps billions, of people without spending much of their § 501(h) permissible lobbying amounts other than costs of employee time (where volunteers are unavailable) and connectivity (a

26. See Ellen P. Aprill, *Amending the Johnson Amendment in the Age of Cheap Speech*, 2018 U. ILL. L. REV. ONLINE 1, available at <https://illinoislawreview.org/online/amending-the-johnson-amendment-in-the-age-of-cheap-speech/>; Manny, *supra* note 3.

trivial number by most accounts). Future technological advances inevitably will continue the march toward free (or inexpensive) lobbying not contemplated in 1976. This makes and will continue to make the dollar limitations on lobbying imposed under §§ 501(h) and 4911 avoidable for wisely crafted lobbying. Useless restrictions should be repealed because they confuse but do not restrict. Furthermore, the very liberal rules under § 4911²⁷ make it possible for many charities (particularly those with members) to engage in significant legislative activity that does not count as lobbying. The internet multiplies the amount of “non-lobbying” lobbying a membership organization can accomplish. The tools are available under current law for significant lobbying by well-counseled public charities electing to use the expenditure test under § 501(h).

The current regime for lobbying by charities could be improved in a simpler way than the SSLF, keeping in place the structures that Fei and Gorovitz so deftly describe in their article, simply by improving §§ 501(h) and 4911. The result would be to bring us much closer to the goal of unlimited lobbying by public charities. I would be in favor of removing the spending caps entirely, given how easy it is for well-counseled charities to operate around the caps, but short of that, the expenditure test should be updated. The following tweaks would help to simplify and increase use of the § 501(h) election and ultimately help to achieve the goal of increasing lobbying in the charitable sector.²⁸

First, make the expenditure test, rather than the substantial part test, the default test. If charities are forced to use the expenditure test to measure lobbying limitations, they or their lawyers will be forced to understand it. Removing the mystery should increase lobbying.

Second, eliminate the regressive sliding scale for Lobbying and Grass Roots Nontaxable and Ceiling Amounts and put in place a flat cap or at least a consistent percentage of exempt purpose expenditures.²⁹ There is no reason to force larger organizations into the fuzzy substantial part test, since the IRS could benefit from the more specific data from larger organizations that would be delivered under § 501(h) disclosures.

Third, reset the caps to bring the expenditure test into the twenty-first century. The caps, first set in 1976 when \$1 million was a lot of money and an organization with \$17 million in Exempt Purpose Ex-

27. I.R.C. § 4911(d).

28. See generally Manny, *supra* note 3 for a more detailed discussion of these proposals.

29. See I.R.C. § 4911(e)(1).

penditures was a big organization, should be indexed for inflation. If the caps were indexed, the 2019 cap on the Lobbying Nontaxable Amount would be in the vicinity of \$4.5 million³⁰ and the Grass Roots Nontaxable Amount cap would be roughly \$1.125 million.³¹ Similarly, if indexed for inflation, the Lobbying Ceiling Amount cap would be roughly \$6.75 million with a Grass Roots Ceiling Amount cap of close to \$1.7 million.³² These numbers provide room for even larger charities to engage in significant lobbying activity, particularly given the most important difference between 1976 and 2019—the ability to engage in low cost lobbying on the internet. Subjecting charities to 1976 limitations in 2019 seems to lack policy and purpose.

Finally, eliminate the distinction between direct and grassroots lobbying. The lower cap for grassroots lobbying as compared to direct lobbying is irrational and should be repealed. The Joint Committee on Taxation has recommended eliminating the separate caps on overall and grassroots lobbying, stating that “there is no significant policy rationale for the separate limitations on grass-roots lobbying.”³³ Charities should be permitted to spend their entire lobbying budgets lobbying the public.

CONCLUSION

The article by Fei and Gorovitz provides the clearest and most practical guide to nonprofit lobbying in all of the literature in the field. I agree with the authors’ goal of increasing participation of public charities in legislative debate and with their assessment of the benefits and burdens of the available options for accomplishing that goal under the current regime. The authors and I also agree that the goal can best be reached by removing real and perceived obstacles to lobbying by charities under current law. Ultimately, though, we disagree on how to

30. *CPI Inflation Calculator*, BUREAU OF LABOR STATISTICS, https://www.bls.gov/data/inflation_calculator.htm (last visited Jan. 18, 2019).

31. *See* I.R.C. § 4911(c)(2) and (c)(3). These caps currently are set at \$1 million and \$250,000 respectively and set a limit on the amounts that organizations electing the expenditure test can spend on all lobbying and on grassroots lobbying without incurring a penalty excise tax under § 4911.

32. *See* I.R.C. § 501(h)(1). These caps currently are set at \$1.5 million and \$375,000 respectively and set a limit on the amounts that an organization electing the expenditure test can spend over a four-year measuring period on all lobbying and grassroots lobbying without jeopardizing tax-exempt status under I.R.C. § 501(c)(3).

33. STAFF OF JOINT COMM. ON TAXATION, 107TH CONG., STUDY ON THE OVERALL STATE OF THE FEDERAL TAX SYSTEM AND RECOMMENDATIONS FOR SIMPLIFICATION, PURSUANT TO SECTION 8022(3)(B) OF THE INTERNAL REVENUE CODE OF 1986, VOLUME II: RECOMMENDATIONS OF THE STAFF OF THE JOINT COMMITTEE ON TAXATION TO SIMPLIFY THE FEDERAL TAX SYSTEM 455 (Joint Comm. Print 2001).

eradicate those obstacles. Fei and Gorovitz suggest creating a new and unfamiliar structure that is unlikely to be enacted into law and unlikely to be used by many charities, while I would prefer to keep the current regime in place but to amend it slightly to conform with policy, law, and technological realities of the twenty-first century. So, in conclusion, I would prefer to tweak and deal with the devil I know than to risk the devil I don't.