

NEWT'S \$300,000, 501(c)(3) BLUES: THEME AND VARIATIONS

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I was teaching at an accredited university; [American Campaign Academy] was an institution being set up as basically a politically training center. My course was open to everybody; [American Campaign Academy] was a Republican course. My course says nothing about political campaigns; [American Campaign Academy] was a course specifically about campaigns.

Newt Gingrich, quoted in Cole Report at 60.

Wouldn't [knowing about the American Campaign Academy case] motivate particularly a Member of the House to want to say, before you start into another one, maybe I ought to sit down with somebody who is a tax expert and tell them the whole plan here, not just the course content, but where the course fits into all the strategies here and say, now, do you think I've got a problem?

Representative Schiff, quoted in Cole Report at 61.

Introduction

On January 17, 1997, the House Select Committee on Ethics transmitted to the House of Representatives its report "In the Matter of Representative Newt Gingrich."¹ The Report detailed the Committee's findings with respect to Gingrich's involvement in a variety of purportedly educational projects undertaken by a variety of section 501(c)(3) educational organizations, thereby putting on the official public record stories of ideological zealotry,

1. In the Matter of Newt Gingrich, Report of the Select Committee on Ethics, U.S. House of Representatives Rept. No. 105-1, 105th Cong., 1st Sess., Jan. 17, 1997. The report is sometimes referred to as the "Cole Report" (and will be in this paper), after James M. Cole, who, as appointed Special Counsel, took the lead role in the investigation of Representative Gingrich's alleged violations of House ethical rules.

political strategy, and possible violations of section 501(c)(3), unofficial versions of which had been gradually coming to light in the press for months.²

The original complaint, brought by Gingrich's 1994 reelection opponent, Ben Jones, concerned Gingrich's alleged use of section 501(c)(3) organizations to create and present a college course, "Renewing American Civilization," that was allegedly designed and intended to promote Gingrich's own reelection and the election of other Republican candidates in the 1994 Congressional election.³ As the Committee's investigation proceeded, the scope was expanded to consider additional allegations of misuse of section 501(c)(3) organizations by Gingrich, most notably, the involvement of the Abraham Lincoln Opportunity Foundation in the development and distribution of television programs to communicate the principles of "Entrepreneurial Free Enterprise, Basic American Values, and Technological Progress," and to organize citizen workshops as a forum for viewing those programs, facilitate discussion of the ideas presented, and mobilize political participation. This project was known as American Citizens Television ("ACTV").⁴

Both projects were intensely ideological. Both were centered on an articulation of a conservative social vision and policy agenda developed by Gingrich in concert with his closest advisors.⁵ The ideology, the social vision, the policy agenda, and the particular articulation

2. See, e.g., Peter Applebome, In Gingrich's College Course, Critics Find a Wealth of Ethical Concerns, *New York Times*, Feb. 20, 1995, A12; Glen F. Bunting, Gingrich's Politics Got Boost from Nonprofits; Foundation: The GOP Leader's Use of 6 Tax-Exempt Agencies Raises Questions by Legal Experts, *Los Angeles Times*, June 25, 1996, A1.

3. Cole Report at 1.

4. Cole Report at 2.

5. I am being careful here not to call them "henchmen."

were also central to GOPAC, Gingrich's section 527 political action committee, the mission of which was "to create and disseminate the doctrine which defines a caring, humanitarian reform Republican Party in such a way as to elect candidates, capture the United States House of Representatives and become a governing majority at every level of Government."⁶

Relying on days of testimony by those who were involved in the projects and on piles of documents gleaned from the files of the involved section 501(c)(3) organizations, GOPAC, and Gingrich himself,⁷ the Committee was able to draw a picture of the genesis and operation of the projects and to arrive at an opinion as to the motivations behind their design and implementation.

In the picture that emerged, Gingrich's goal was to launch a movement - the Renewing American Civilization Movement - within which the citizenry, particularly the apolitical, non-voting citizenry, would be mobilized to consider the important social and economic issues facing America, to recognize that the road to their solution lies in embracing and acting upon the ideas around which the movement would be centered, to link ideology and social vision to political participation, and, ultimately, to elect candidates (almost certainly conservative Republicans) who share the vision and, in fact, choose to describe the vision in the terms provided by the Gingrich-generated script. The central thrust of the effort was to define and widely disseminate a message that would set the terms of the national debate on social

6. GOPAC Report to Charter members, quoted at page 10 of the Cole Report and reproduced as Exhibit 1 of the Report. As General Chairman of GOPAC from 1986 through 1995, Gingrich had primary responsibility for inventing and identifying the PAC's goals, message, and strategies. Cole Report at 10.

7. Exhibits comprise 1131 pages of the 1271-page printed report.

priorities and public policy. American Citizens' Television and the Renewing American Civilization course were two of several interrelated vehicles for accomplishing this goal.

American Citizens' Television

American Citizens' Television began as a project of GOPAC, under the name of American Opportunities Workshop ("AOW"). The AOW idea was launched in 1990 as part of a Gingrich/GOPAC strategy to develop and disseminate a new conservative Republican message, with the ultimate goal of electing a Republican majority. AOW was a television program hosted by Gingrich and broadcast in May, 1990, around theme of "Triangle of American Success" - Entrepreneurial Free Enterprise, Basic American Values, and Technological Progress." The program deliberately avoided explicitly identifying these themes as Republican ideas; early planning for the project (in Gingrich's handwriting) notes the desirability of "develop[ing] a reform movement parallel to the official Republican Party in order to engage potential voters who are 'non-political or anti-political.'"⁸ In addition to production of the television show itself, the AOW project entailed arranging 600 citizen workshops around the country where groups would watch the show and begin to create a citizens' movement defined by the show's message. According to the Executive Director of GOPAC at the time, "we truly believed that the more we could involve people and educate people, the more likely we were to have people vote Republican."⁹

The project was expensive, and a decision was made early on to transfer it to the

8. "Key Factors in a House GOP Majority," discussed and quoted in Cole Report at 13-15 and reproduced in Exhibit 13. Gingrich echoed these ideas in a March, 1990 congressional briefing. Cole Report at 14-15.

9. Cole Report at 11.

Abraham Lincoln Opportunity Foundation ("ALOF"), a section 501(c)(3) organization founded by Bo Callaway in 1984, while he was chairman of the Colorado Republican Party, to support programs for inner city youth.¹⁰ At the time ALOF took on the project, the organization had been dormant for years. ALOF had significant, though unofficial, connections to GOPAC. ALOF had been Callaway was the organization's president and GOPAC's chairman; Kay Riddle, Executive Director of GOPAC, was ALOF's secretary.¹¹ Gingrich continued to be significantly involved in the ACTV project, which was housed in the GOPAC offices and carried out in large part by staff who were shared by GOPAC or who had worked for GOPAC and were now employed by ALOF to work on ACTV. The project was managed by Jeffrey Eisenach under a contract between ALOF and Eisenach's consulting firm, the Washington Policy Group ("WPG"). WPG's only other client was GOPAC, which paid for the consulting services in part by allowing WPG to use GOPAC office space and equipment. Operating funds for ACTV were provided through a bank loan, loans from GOPAC, and contributions from several GOPAC supporters, some of whom were solicited by Jeffrey Eisenach, then-Executive Director of GOPAC, and some of whom were apparently advised that tax-deductible contributions to ALOF would make their way back to GOPAC as loan repayments. Bo Callaway's foundation made a gift to ALOF which was promptly used to pay down the GOPAC loan, was acknowledged on ALOF stationary "on behalf of the staff and creditors of the Abraham Lincoln Opportunity Foundation," and which was considered to

10. It seems that even at its inception and before it took on the ACTV project, this charity may have been a cog in the wheel of partisan strategy.

11. Cole Report at 12.

qualify Callaway as a "Charter Member" of GOPAC.¹²

Special priority was given to obtaining host sites for workshops in Gingrich's congressional district, which was identified as a "target of opportunity."¹³ Internal GOPAC communications list ACTV as a GOPAC project; GOPAC contributor lists track histories of giving to GOPAC and ALOF. GOPAC's 1990 Report to Charter Members acknowledged the formal separation of ACTV from GOPAC, but described the ACTV project in terms that clearly claim it as a GOPAC strategy.¹⁴

Renewing American Civilization

The Renewing American Civilization project exhibited a similar relationship to the overall Gingrich/GOPAC agenda and similar patterns of relationships among key players and various organizations, although in the case of Renewing American Civilization, not all of the organizations involved were fundamentally parts in Gingrich's machine, as were the organizations involved in the ACTV project.

Documents from Gingrich's own files and those of GOPAC indicate that Gingrich envisioned "Renewing American Civilization" as an organizing theme for a conservative Republican capture of the national policy agenda. The plan was to cultivate a social action movement through which the theme and its component messages would be communicated and ultimately adopted by citizens who would translate their new-found political consciousness into electoral action, namely, by voting into office conservative Republicans who had also

12. Cole Report at 12-13, 20-22, Exhibits 30-31.

13. Cole Report at 19, Exhibits 22-23.

14. Cole Report at 19-20.

adopted the theme as their own.¹⁵ Overall, the goal of Renewing American Civilization was "to develop a blueprint for renewing America by replacing the welfare state, recruit, discover, arouse and network together 200,000 activists including candidates for elected office at all levels, and arouse enough volunteers and contributors to win a sweeping victory in 1996 and then actually implement our victory in the first three months of 1997."¹⁶ One of three specific goals listed under this general goal was "to teach a course on Renewing American civilization. . . and make it available by satellite, by audio and video tape and by computer to interested activists across the country."¹⁷

Initial planning for the Renewing American Civilization course took place in the GOPAC offices in early 1993. The course was to be both a vehicle for developing the specifics of the message and a key mechanism for disseminating the message. As with the ACTV project, key GOPAC staff were involved in organization and implementation, and there was ongoing coordination with GOPAC, which had adopted the Renewing American Civilization theme as its 1993 and 1994 political message.¹⁸ Major contributors to GOPAC were invited to help develop the content of the course. GOPAC staff raised funds for the course, and GOPAC communications referred to the course as part of the overall GOPAC

15. Cole Report at 22-24.

16. "Draft, Renewing America Vision," quoted in Cole Report at 28, and reproduced as Exhibit 52.

17. Id.

18. In addition, Gingrich attempted to mobilize incumbent House Republicans to adopt the Renewing American Civilization message and to "promote [the] message so that this defines many 1994 electoral contests at the congressional level and below, and defines the 1996 national election. Cole Report at 45, Exhibit 102.

strategy.¹⁹ A letter over Gingrich's signature stated, "if we can reach Americans through my course, independent expenditures, GOPAC and other strategies, we just might unseat the Democratic majority in the House in 1994 and make government accountable again."²⁰

The theme of the course took off from the ideas of ACTV, but was more far-reaching and elaborately developed. The course itself was to be taught by Gingrich in ten sessions. In addition to live presentation of the course, plans were made to offer the course at multiple remote locations through satellite transmission and by videotape. The course was first offered at Kennesaw State College as a "Special Topics" course, which needed only the approval of the dean of the business school and could by-pass the usual faculty course approval process.²¹ Gingrich taught half of the 40-hour course; the dean taught the other 20 hours. Gingrich's portions were taped for distribution to remote sites where the course might be offered. Funds for the course were raised through the Kennesaw State College Foundation ("KSCF"), an existing section 501(c)(3) organization formed to raise funds and provide support to the state college. The Foundation's role was essentially that of banker for funds raised for and spent on the course; it contracted with Jeffrey Eisenach's Washington Policy Group to manage the project. Eisenach and his staff undertook a vigorous marketing effort to get the course presented at remote sites. By the time the Georgia legislature passed a

19. Cole Report at 30-35.

20. Cole Report at 37; Exhibit 87.

21. Cole Report at 51-52.

resolution barring even uncompensated teaching in state institutions by elected officials,²² the KSCF/WPG contract had run out, and fundraising, management, and marketing for the course had been turned over to the Progress and Freedom Foundation ("PFF"), a section 501(c)(3) organization founded and led by Jeffrey Eisenach.²³ The course was moved to Reinhardt College, a small private college in Georgia. There, it did go through a curriculum review process,²⁴ and a decision was made that the college would have no involvement beyond the offering of the course on campus - fundraising and coordination of remote site presentations would all be handled by PFF.²⁵

The Committee's Response

Having thus drawn the picture, the Committee concluded that Gingrich ought to be subject to sanction under Rule 43(1) of the rules of the Committee on Standards of Official Conduct. Gingrich knew or should have known, concluded the Committee, that these projects, carried out in this manner, carried a substantial risk of causing the organizations to violate section 501(c)(3), and his failure to get expert legal advice before using the

22. This legislative action was apparently in response to reactions of the press and the Kennesaw State College faculty to the school's offering the course. See Cole Report Exhibit 127 (consisting of various faculty memos and letters). One of them begins, "We are disappointed and outraged to hear that the college is permitting, in fact promoting, use of college time, equipment and personnel for the advancement of the political ideas of an elected official." Faculty were not mollified by the fact that Gingrich was not being paid for teaching the class. See also Joyce Price, Course by Gingrich splits faculty at Georgia college, The Washington Times, A4, September 4, 1993.

23. Cole Report at 52-53.

24. Minutes of the College Curriculum Committee indicated that "[a] decision was not made as to where the course will fit into the college curriculum or which department(s) will oversee the course." Cole Report Exhibit 129.

25. Cole Report at 53-54.

complained-of arrangements constitutes behavior that does not "reflect creditably on the House of Representatives."²⁶ Further, the Committee concluded, Gingrich ought to pay \$300,000 to reimburse the House for part of the cost of the investigation, because the difficulty and expense of the investigation was due, in significant part, to Gingrich's own failure to cooperate in providing accurate and complete information to the Committee.²⁷

What the Committee did not decide, in the end, was whether these projects, as carried out, actually did cause the organizations involved to violate section 501(c)(3). It did, however, turn over all relevant documents to the Internal Revenue Service, believing that the job of deciding whether the organizations involved had, in fact, violated the precepts of section 501(c)(3) properly belongs to the Service.²⁸

Having given substantial thought in the past to the section 501(c)(3) limits on political

26. Rules of the Committee on Standards of Official Conduct, Rule 43, clause 1.

27. Cole Report at 3. This led to another string of commentary on Gingrich's evolving strategies for paying the \$300,000. See, e.g., Jasper L. Cummings, Further Thoughts on the Gingrich "Fine," 97 TNT 22-71 (Feb. 3, 1997); Lee A. Sheppard, Another Alternative for Newt's "Fine," 97 TNT 30-7 (Feb. 13, 1997); Heidi Glenn and Lee A. Sheppard, Gingrich Borrows from Bank of Bob Dole, 97 TNT 75-2 (Apr. 18, 1997); Speaker Announces Plan to Pay \$300,000 Reimbursement with Personal Funds to Protect Taxpayer, 97 TNT 76-55 (Apr. 21, 1997); John Godfrey, Democrats Say Newt Can't Deduct \$300,000 Assessment, 97 TNT 80-5 (Apr. 25, 1997).

28. Cole Report at 90, 97. See also Statement of Congressman Porter Goss, member of the investigative subcommittee, upon release of the Cole Report:

On the 501(c)(3) matters, we did not substitute our judgment for that of the IRS. I believe it would be unwise, if not foolish for four members of Congress to try to adjudicate or enforce tax law in areas where the IRS has thus far avoided treading or perhaps fears to tread. To say there are many differing views of 501(c)(3) tax laws is a major understatement. I found none of the experts or the writings of the cognoscenti on taxation totally persuasive and I'd be happy to elaborate on that at a later time, but I don't think this is a tax area.

activity, with the result of that thought being proposals to liberalize the constraints in various ways, and, at the same time, finding Gingrich's social/political agenda and the style he projects as he pursues his goals to be highly distasteful, I could not help but see the Gingrich episode as an invitation test my positions. In this nugget, I take the opportunity to attempt to work through whether the Service (should it decide to accept the challenge) likely will find section 501(c)(3) violations, to consider what it should find (which may not be the same as what it will find), and to explore the question of whether the whole episode casts any new light on how we should think about the interface between politics and charity.

The Section 501(c)(3) Issues

All concerned agreed that the activities at issue were safely "educational" for purposes of section 501(c)(3) because they involved either the "instruction . . . of the individual for the purpose of improving or developing his capabilities" or "the instruction of the public on subjects useful to the individual and beneficial to the community."²⁹ Further, although the projects involved discussion of issues of public importance and had a distinct ideological bent, they were conducted in a manner that satisfied the Methodology Test.³⁰ All agreed that

29. Treas. Reg. §1.501(c)(3)-1(d)(3)(i).

30. The Methodology Test, adopted as official IRS policy in Revenue Procedure 86-43, declares that advocacy of a particular viewpoint is "educational" if:

- (a) The presentation of viewpoints or positions unsupported by facts is a significant portion of the organization's communications.
- (b) The facts that purport to support the viewpoints or positions are distorted.
- (c) The organization's presentations make substantial use of inflammatory and disparaging terms and express conclusions more on the basis of strong emotional feelings than of objective evaluations.
- (d) The approach used in the organization's presentations is not aimed at developing an understanding on the part of the intended audience or readership because it does not

Gingrich's involvement with the organizations did not give rise to private inurement concerns and that the projects did not implicate the section 501(c)(3) limitations on legislative advocacy. The issues that formed the basis for the Committee's sanction of Gingrich were whether, in carrying out the projects, the organizations involved were operated for private, rather than public benefit, thereby failing to be "operated exclusively for [exempt] purposes" and whether the projects constituted intervention in an election campaign, in contravention of section 501(c)(3)'s proscription on such activity. The Committee's expert, Celia Roady, concluded that the projects did serve private interests and that they constituted campaign intervention.³¹ Gingrich's tax counsel, James P. Holden, testifying before the Committee, concluded that they did not.³² The Committee itself avoided arriving at any conclusion on these matters. Instead, it decided that the issues, although difficult and uncertain to resolve, were clearly enough raised by the activities so that Gingrich, known to be familiar with the idea that the politics/charity interface is fraught with peril by virtue of his earlier involvement with the American Campaign Academy,³³ ought to have obtained expert legal advice before proceeding.

501(c)(3) Violations?

The evidence collected by the Committee appears sufficient to establish that the roles taken by the Abraham Lincoln Opportunity Foundation and the Progress and Freedom

consider their background or training in the subject matter.

31. Cole Report at 63-70.

32. Cole Report at 70-77.

33. See Cole Report at 8.

Foundation in the projects constituted election campaign intervention on their part.³⁴ The targeted use of the ACTV program for workshops in Gingrich's district seems pretty clearly enough on the wrong side of the lines established by the IRS with respect to geographic targeting of programs so as to override any argument that they are neutral voter education or issue advocacy.³⁵ Ongoing coordination of the programs with GOPAC and GOPAC's appropriation of the programs to rally its supporters to its cause - that is, electing Republican candidates - constitutes support of particular partisan campaign efforts.³⁶

Finding that ALOF's and PFF's activities constituted campaign intervention is probably sufficient in itself to find that the activities further private interests more than incidentally. By definition, to directly and deliberately contribute to the campaign efforts of a particular individual or to the accomplishment of the non-charitable goals of a non-charitable organization is to serve private interests.

The case with respect to the Kennesaw State College Foundation, Reinhardt College,

34. In their Report of Counsel for the Respondent, Gingrich's lawyers make the point that the evidence collected was used by the Special Counsel and the Committee "free from the tests of cross-examination, hearsay limits and other evidentiary standards to assure accuracy." In the Matter of Speaker Newt Gingrich, Report of Counsel for the Respondent, January 16, 1997, 97 Tax Notes Today 16-78, January 24, 1997. Of course, the IRS would be equally free of those constraints in deciding whether 501(c)(3) had been violated.

35. Implicit endorsement timed to coincide with a campaign or selectively distributed to geographic areas where it might be expected to influence an election contest is campaign intervention, not neutral voter education. See Rev. Rul. 78-248, 1978-1 C.B. 154.

36. Participation in the work of a campaign effort is campaign intervention. See, e.g., Gen. Couns. Mem. 39,414 (Sept. 25, 1984)(concluding that members, acting for organization, actively involved in fundraising and door-to-door canvassing, violate prohibition); IRS News Release IR-96-23 (Apr. 24, 1996) (pointing out that not only endorsement of or opposition to candidates constitutes campaign intervention; organizations cannot "become involved in any other activities that may be beneficial or detrimental to any candidate.")

and the other schools that opted to offer the Renewing American Civilization course (on tape) is less clear. First, the Service has recognized on other occasions that activities that might fairly be characterized as campaign intervention, undertaken within the context of a school's ordinary instructional program and adjunct activities, does not violate the proscription. For example, a political science course requirement that students work in a campaign was held not to constitute campaign intervention,³⁷ as were candidate endorsements in a college newspaper.³⁸ In both situations, however, the Service took note of the fact that the schools themselves were not taking a position on candidates - candidate selection and opinions expressed were by the students. Schools that offered the Renewing American Civilization course as a student-initiated course³⁹ might well be in an analogous position to the schools that were the subject of those rulings. However, Kennesaw State College and Reinhardt College are in a different position. Whereas the schools in the rulings were providing a neutral educational forum within which students could learn about politics by working within a campaign they selected or could learn about journalism by taking and expressing a position on political contests, when Reinhardt College and Kennesaw State College offered the Renewing American Civilization course, it was an official act of the school. On the other hand, Renewing American Civilization was just one course on an educational menu, and its content, according to all consulted by the Committee, was concededly "educational" under the

37. Rev. Rul. 75-512, 1972-2 C.B. 246.

38. Rev. Rul. 72-513, 1972-2 C.B. 246.

39. University of California at Berkeley, for example, offered the course for credit on this basis. Renewing American Civilization Site Host Listing, August 18, 1994, reproduced as Cole Report Exhibit 118.

definitions of 501(c)(3) unless and until it is examined in the light of the goals and intentions of Gingrich, Eisenach, and other organizers of the project.

Clearly, Renewing American Civilization was part of the same package as ACTV. The intentions of Gingrich, Eisenach, and other key players with respect to the use of the project to promote Gingrich's political fortunes and the electoral agenda of GOPAC were the same for Renewing American Civilization as they were for ACTV. The need to consider those goals and intentions to find that the Renewing American Civilization course was a tool for private benefit and campaign intervention is what casts the most doubt on whether the colleges' involvement in the course ought to be seen as violations of section 501(c)(3) on the part of the schools and KSCF. What makes this otherwise concededly educational project violative of section 501(c)(3) is found not in the content of the course, but the content of the course considered in the context of all the surrounding facts and circumstances. The facts and circumstances that make the difference are found in the evidence that identifies the course as one element of the overall Gingrich/GOPAC strategy to elect himself and other Republicans. Should Gingrich's intentions be attributed to the colleges as well? Should the colleges be tainted by GOPAC's touting of the course as one of its own strategies when no evidence uncovered by the Committee suggests that the colleges' purpose in offering the course was to promote Gingrich?⁴⁰ Unlike ALOF and PFF, Kennesaw State College and Reinhardt College were not controlled by the same people who controlled GOPAC. Doing what appears to be legitimately "educational" without information that it is being used by someone in a way that

40. Both colleges seemed to think that offering the course would "put them on the map." The notoriety they achieved as a consequence of the course is not what they had in mind.

would make it campaign intervention ought not to be sufficient to penalize the innocent organization.

Thus, on the basis of the evidence uncovered by the Committee, the IRS probably would, and probably should find 501(c)(3) violations, at least on the part of ALOF and PFF. But these cases are so easy that they aren't really all that interesting, unless the IRS were to go beyond the direct and almost obvious reasons already discussed and support a result with additional reasons that are suggested by ways the Service has approached the private benefit and election campaign intervention questions in the past. If it were to do so, the results here would be the same, but principles would be established (or reinforced) that could be extrapolated to other situations, to possible ill effect. One way to explore this possibility is to look at hypothetical variations of the situation presented by Gingrich's activities, gradually stripping away factors that are present there, to see how many of them would have to be gone before the IRS would, or should (again, keeping open the possibility that these two might be different), find no campaign intervention or disqualifying private benefit.

The following factors are present in the situation examined by the Committee:

1. The projects involved discussion of social values and public policy;
2. The projects put forth a particular viewpoint on the issues, and that viewpoint was aligned with a particular ideology;
3. The positions taken in the projects were designed and articulated by an ideologue, in fact, the ideologue who aimed to be the central ideologue with

respect to this ideology;⁴¹

4. The ideology involved was substantially aligned and identified with one major political party;
5. The entrepreneurial force behind the projects emanated from a leader of that political party;
6. The projects originated within a PAC;
7. The PAC's identified mission was to promote the electoral success of that one major political party;
8. Party success was identified as a goal of the projects, both at their inception and as they were spun off from the PAC and taken over by section 501(c)(3) organizations;
9. As the projects proceeded in the hands of the section 501(c)(3) organizations, there was continued coordination with the PAC, and the PAC repeatedly and consistently claimed the projects as among its own strategies;
10. At least one of the projects was put to explicit use to aid the campaign of the projects' originator.

Exploring Variations

Hypothetical #1: Take Away the Smoking Guns

As a first hypothetical, consider the ACTV and Renewing American Civilization

41. In notes generated early in the process of planning for the Renewing American Civilization movement, Gingrich identified his own role as the "advocate of civilization," the "definer of civilization," the "teacher of the rules of civilization," the "arouser of those who form civilization," the "organizer of the pro-civilization activists," and the "leader (possibly) of the civilizing forces." Cole Report at 23, Exhibit 42.

projects as they were, but take away the opportunity to get inside the heads and files of the principals.⁴² We would be left then with the picture that Gingrich, his tax counsel, and his counsel draw. Factors 8, 9, and 10 fall away; factors 1 through 7 remain. Gingrich acknowledged that the projects, thus described, "[go] right up to the edge," but said that they [don't] go over the edge, [don't] break any law, [aren't] wrong. It's aggressive, it's entrepreneurial, it's risk-taking."⁴³ Gingrich's counsel characterized the projects as nonpartisan political education activities that were entirely appropriate undertakings for section 501(c)(3) organizations, and the interrelationships among Gingrich and the organizations involved as perfectly acceptable, as applicable law was understood in 1992 and 1993.⁴⁴ Gingrich's tax counsel, incorporating factors 1 through 7 into his consideration, but likely not privy to the documents and statements that establish factors 8 through 10, characterized the Renewing American Civilization course as appropriate section 501(c)(3) educational activity, although, had he been consulted prospectively, he would have advised Gingrich "to find a way of financing the course that doesn't involve the use of 501(c)(3) funds," "because the

42. One advantage the subcommittee had in this investigation was the availability of a vast body of documentation from multiple sources that had been created contemporaneously with the events under investigation. A number of documents central to the analysis of the matter, in fact, had been written by Mr. Gingrich. Thus, the documents provide a unique, contemporaneous view of people's purposes, motivations, and intentions with respect to the facts at issue.

Cole Report at 3.

43. Peter Applebome, In Gingrich's College Course Critics Find a Wealth of Ethical Concerns, New York Times, Feb. 20, 1995, A1, quoted in Cole Report at 59.

44. Report of Counsel for the Respondent at ¶¶17-22, 67. The main thrust of the Report is that, given the lack of clarity in the law at the time the activities took place, Gingrich should not be heavily penalized for failing to predict what appears in hindsight to be a possible violation of section 501(c)(3).

intersection of political activity and 501(c)(3) is such an explosive mix in terms of the IRS view of things."⁴⁵

It seems likely that the IRS would indeed find this picture to be one of "an explosive mix," but unlikely that it would agree with the conclusion that section 501(c)(3) was not violated, even with factors 8 through 10 dropped from the list. It seems almost certain that the Service would find disqualifying private benefit in this picture, based on its position, upheld by the Tax Court, in American Campaign Academy.⁴⁶ There, the IRS argued and the Tax Court agreed that the Academy provided "instruction or training of the individual for the purpose of improving or developing his capabilities," and was, therefore, "educational."⁴⁷ The education of individuals is understood to confer private benefit on the individuals who receive the education. The public benefit that justifies section 501(c)(3) exemption in the case of schools is said to be the secondary benefit that flows to the public at large by virtue of educating its individual members. In the case of the American Campaign Academy, the Tax Court held that the secondary benefit of the Academy's educational endeavors flowed to too limited and "select" a group to be considered broad public benefit.⁴⁸ Graduates of the Academy's program went to work almost exclusively in campaigns of Republican candidates - neither a broad enough class nor an inherently charitable one. On the authority of American Campaign Academy, the Service would likely find disqualifying private benefit in the scenario

45. Cole Report at 76.

46. American Campaign Acad. v. Commissioner, 92 T.C. 1053 (1989).

47. Treas. Reg. §1.501(c)(3)-1(d)(3)(i)(a).

48. Id. at 1076.

as modified so far.⁴⁹

The Service might support its finding of private benefit with another line of reasoning, alluded to by both the IRS and the Tax Court in American Campaign Academy and pursued by the IRS in the case of the Bob Jones Museum.⁵⁰ In American Campaign Academy, the court noted that training similar to that conducted by the Academy had previously been undertaken by the National Republican Congressional Committee.⁵¹ In the Bob Jones Museum case, the Service explicitly argued that a non-exempt entity's splitting off of parts of its activities that, standing alone, seem qualified for section 501(c)(3) exemption, redounds to the private benefit of the non-exempt organization by shifting the fiscal burden of functions that were formerly supported by the non-charitable organization to one that can attract deductible contributions, by enhancing the reputation of the non-charitable organization by its continued association with the spun-off function, and by providing "an aura of tax-exempt status" through the association."⁵² In Hypothetical #1, the argument would be that both the ACTV and Renewing American Civilization projects had belonged to GOPAC. Moving them into section 501(c)(3) organizations, either specifically created (or revived) for the purpose, or, as in the case of the Renewing American Civilization course, running them through

49. The Summary of Law Pertaining to Organizations Exempt from Federal Income Tax Under Section 501(c)(3) of the Internal Revenue Code, which appears as an Appendix to the Cole Report, offers a rather extensive description of American Campaign Academy's take on private benefit.

50. Bob Jones University Museum and Art Gallery v. Commissioner, T.C. Memo 1996-247.

51. 92 T.C. at 1056.

52. Respondent's Brief in Opposition to Declaratory Judgment for Granting of Tax-exempt Status, 95 TNT 244-36 at 117. For a discussion of this case, see Victoria B. Bjorklund, Spinoffs: Bob Jones University Museum and Beyond, 16 The Exempt Org. Tax Rev. 57 (Jan., 1997).

existing organizations in the context of ongoing, larger educational endeavors, conferred private benefit on GOPAC because it allowed the continuation of programs that GOPAC wished to see in existence, at no expense to GOPAC and, for that matter, with the advantage of tax-deductible support.

If the IRS were to approach the modified scenario this way, it would reach the right conclusion but, to my mind, at least in part for the wrong reasons. Simply splitting off part of a non-exempt organization's activities into a separate organization in order to qualify the activities for tax-deductible support does not amount to private benefit. In Bob Jones Museum, the Tax Court unequivocally rejected the Service's private benefit arguments, noting that the fiscal burdens picked up by the spin-off organization were entirely generated by the spun-off function, and the assumption of those burdens along with the function provided no private benefit to the parent non-charitable organization. Further, the court rejected the Service's "aura" argument as entirely manufactured, and lacking in both support and substance. And the Tax Court's characterization of the private benefit issue American Campaign Academy is highly unsatisfactory. The court's idea that if the secondary benefit generated by the education of individuals flows differentially to any non-charitable group more defined than the broad public at large there is disqualifying non-incidental private benefit was supported neither by logic nor by precedent. In holding that "Republicans" are too definite a class of secondary beneficiaries to support exemption, the court baldly stated, but failed to explain why, training people to work for Republican organizations and campaigns provides a more definite secondary benefit to private interests than does, for example, training people for work in the banking industry, which the Service has held does

not implicate disqualifying private benefit.⁵³

Nonetheless, the IRS and the Tax Court reached the right conclusion in American Campaign Academy. The opinion makes repeated references to the partisan focus of the campaign academy, but except to say that "Republicans" comprise a finite, albeit large, class, does not explain the significance of the observation. In fact, the partisan focus of the academy provides a legitimate ground for denial, although it is a ground the court overlooks. The result here would be right not because of disqualifying private benefit, but because at common law trusts to promote the fortunes of a particular political party have never been charitable.⁵⁴

Does the hypothetical scenario implicate the section 501(c)(3) campaign intervention prohibition? I have taken the position that campaign intervention ought to turn on "express advocacy" as that term is understood in the context of the Federal Election Campaign Act,⁵⁵ as have others.⁵⁶ The FECA "express advocacy" standard is met only by "communications

53. 92 T.C. at 1073-75 (purporting to distinguish Rev. Rul. 68-504, 1968-2 C.B. 211); see also Rev. Rul. 72-101, 1972-1 C.B. 144, and Rev. Rul. 67-72, 1967-1 C.B. 125 (each granting section 501(c)(3) status to a program to train individuals working or desiring to work in a particular industry and funded by industry employers).

54. See, e.g., Restatement (Second) of Trusts §374(k) (1959).

55. See Laura B. Chisolm, Politics and Charity: A Proposal for Peaceful Coexistence, 58 Geo. Wash. L. Rev. 308 (1990); Laura B. Chisolm, Sinking the Think Tanks Upstream: The Use and Misuse of Tax Exemption Law to Address the Use and Misuse of Tax-Exempt Organizations by Politicians, 51 Pitt. L. Rev. 577 (1990).

56. See Exempt Organization Committee of ABA Tax Section, Commentary on Internal Revenue Service 1993 Exempt Organizations Continuing Professional Education Technical Instruction Program Article on "Election Year Issues," reprinted in 11 Exempt Org. Tax. Rev. 854 (Apr., 1995). Principal authors of this commentary were Gregory L. Colvin and Miriam Galston.

that expressly advocate the election or defeat of a clearly identified candidate."⁵⁷ Quite clearly, the IRS does not agree.⁵⁸ For example, the 1993 IRS Continuing Professional Education Manual explains that issue advocacy "may serve as the opportunity to intervene in a political campaign in a rather surreptitious manner," and notes that "code words," such as "conservative," "liberal," "pro-life", "Republican," "Democrat," etc. may substitute for a candidate's name and, when used in the context of discussion of an election or candidacy, may be campaign intervention.⁵⁹ Here, it may be that the degree of alignment between the (c)(3) message, themes, and particular language and those of GOPAC, as well as Gingrich's own campaign rhetoric, is just too hard to overlook, and may be transparent enough "code" language to qualify as the equivalent of "express advocacy" for FECA purposes.

Hypothetical #2: Taking Away the "Republican" Label

Why does it matter how we get to the result if the result is the same in any case? That begins to become clear when we move to the next hypothetical. Consider the case where the political organization in the mix is not a Republican PAC. Instead, it is an unconnected ideological PAC. Its primary purpose, as required by section 527, is to work

57. Once in awhile, the FEC has found the equivalent of express advocacy in language short of "vote for Candidate X." However, these instances are rare, and involve statements very close to express advocacy in a context that is clearly election-focused.

58. Has clearly said it does not believe that an FECA-like "express advocacy" standard would make sense in the context of the section 501(c)(3) campaign intervention prohibition. Cites.

59. Judith E. Kinchell and John F. Reilly, Election Year Issues, 1993 Internal Revenue Service Exempt Organizations Continuing Professional Education Technical Instruction Program 400, 411-13.

toward the nomination and election to public office⁶⁰ of candidates. Factors 1 through 6 remain, but factors 7 through 10 are gone. Is there disqualifying private benefit? Disqualifying election campaign intervention? Other reasons why the organizations conducting the projects should not qualify for section 501(c)(3) status?

If I have predicted correctly the Service's approach to the previous hypothetical, it would likely deny the exemption to these organizations as well. The fact that we take "Republican" out of the picture wouldn't make a difference under the IRS Bob Jones Museum approach,⁶¹ and it seems quite comfortable to extrapolate the American Campaign Academy approach to private benefit to this situation. The reasoning would be that the real point of these admittedly otherwise educational activities is to benefit a "select" group of office-seekers, i.e., conservatives and, where Gingrich is showcased, Gingrich himself. The same observation would support a finding of prohibited campaign intervention, since even non-partisan (non party-identified) endorsement or direct or indirect support constitutes campaign intervention.⁶² And in at least one Private Letter Ruling, the Service found that advocacy on behalf of "conservative" positions on issues and linking upcoming election outcomes (without naming candidates) to the organization's agenda in order to stimulate contributions to the organization was tantamount to speaking out on behalf of Republican candidates.⁶³

60. Internal Revenue Code §527.

61. The IRS Bob Jones Museum argument may be a straw man in my analysis, because having lost on the issue in the Tax Court, the Service might not try to pursue this direction again.

62. See, e.g., *The Association of the Bar of the City of New York v. Commissioner*, 858 F.2d 876 (2d Cir. 1988).

63. Private Letter Ruling 9609007 (Dec. 6, 1995).

What result would I arrive at in this hypothetical? If Gingrich takes a continuing lead role, the candidate forum rulings make it campaign intervention. But take Gingrich out of the spotlight - maybe put him in the Senate, where we can argue that there are off years in the election cycle. He launches the ideas, but is not making parallel use of them in his own campaign. Whereas the IRS would likely still find campaign intervention, I would propose that now that we should not. There is no express advocacy in support of or in opposition to a candidate, and the circumstances necessary to find that the use of code words is equivalent to "express advocacy" under the FECA are not present, because the activity takes place outside the context of an active election campaign. Furthermore, there is no private benefit here, for the same reasons that I would not find it in the Hypothetical #1. And here, because the activities are not expressly in support of a particular political party, my reasons for reaching the result in American Campaign Academy are absent.

Hypothetical #3: Narrow the Ideology

Now alter the hypothetical again. Suppose the PAC's agenda does not center around a general ideological position. Instead, the PAC's mission is linked to a particular issue, for example, environmental protection or opposition to abortion rights. The PAC develops course materials and a series of discussion workshops that explain and promote its position and splits the project off into a separate section 501(c)(3) organization. While it may ask for too much suspension of disbelief to imagine that this project is as successfully promoted and disseminated as were ACTV and Renewing American Civilization, the question remains whether the organizations involved have violated section 501(c)(3).

Suppose our environmental protection PAC was organized by a sitting elected official, who maintains her connection to the PAC. Furthermore, the substance and language of the PAC's message, and now the message of the section 501(c)(3) organization(s) that have been formed or enlisted to carry out the citizen education project, are rooted in the writings of this officeholder, and the officeholder (who has a Ph.D. in wildlife biology and used to be a college professor) is engaged to teach a course that incorporates the ideas at a small college in her home state. Is there private benefit here, or prohibited campaign intervention? If the projects are not "claimed" by or coordinated with the PAC as Renewing American Civilization was "claimed" by and coordinated with GOPAC, and assuming that the project is not used directly in support of campaign efforts of the central elected figure, given the leeway that seems to be granted to possibly political activity carried on in the context of the full-blown educational enterprise that a college undertakes, the college course would likely not be seen to implicate the election participation prohibition or prohibited private benefit.

But suppose this organization's project is more like ACTV than Renewing American Civilization, and the organization involved is a section 501(c)(3) organization formed solely to carry on the project. The organization's message concerns not just the substance of environmental protection policy, but explicit encouragement to link conviction to electoral action. The organization itself does not identify or endorse specific candidates, but some candidates pick up the organization's message, using the organization's language. The PAC that spawned the (c)(3) organization uses the same language, and in its communications with supporters points to the project as part of an overall campaign to change environmental policy. At bottom, this is the Gingrich situation without the direct use by the section

501(c)(3) organization of the project in a particular campaign, and with the party identification of the message removed. Is there private benefit here, or campaign intervention?

Under the reasoning of Bob Jones Museum, the transfer of a (c)(3)-qualified function from a non-(c)(3) organization to a (c)(3) organization should not be seen as providing private benefit to the transferring organization simply because it allows the activity to continue without financial burden to the transferring organization and with deductible dollars that the function could not attract if it remained within the non-(c)(3) entity. Under the rationale of American Campaign Academy as presented by the IRS and the Tax Court, there remains a question as to whether educational efforts that are intended ultimately to translate into electoral success for an identifiable subset of candidates (here, environmental protectionists) might be characterized as providing a non-incidental private secondary benefit.

What about campaign intervention? Here, although the organization's positions may be less tightly linked to a particular party than was the case in the earlier hypothetical, election support or opposition need not be party-specific to violate the section 501(c)(3) prohibition.⁶⁴ While issue advocacy that is not campaign-linked is clearly permissible under section 501(c)(3), the Service's flexible facts and circumstances approach and broad statements about what may constitute campaign intervention make it difficult to predict how it would rule on this situation. One Private Letter Ruling deals with an organization that defined its purposes as "improvement of the conditions of the poor, the underprivileged, the

64. *The Association of the Bar of the City of New York v. Commissioner*, 858 F.2d 876 (2d Cir., 1988).

consumer, and the alienated." The organization's program priorities in the 1984 presidential election year were "voter registration/political empowerment, central America, and the economy." Among the explicit goals of one of the organization's projects that year were "to use the spotlight of the 1984 campaign to educate the citizens about peace and arms control issues by injecting these issues into Congressional and Presidential races and to effectively define the war and peace issues as they would be discussed in Congressional and Presidential races." In pursuit of these goals, the project placed radio and television advertisements, broadcast around the Reagan/Mondale foreign and defense policy debate. The commercials put forth the organization's liberal position on war and peace issues, and urged listeners to "think about it when you vote this November," "choose leaders who will lead us away from a nuclear nightmare," "vote - our future depends on it," and "something has to change." On the way to its conclusion in the Ruling, the Service observed that "[b]ecause of the content and timing of the ads, it would be difficult to rate them as comparable to . . . nonpartisan voter education activities, such as the candidate forum/debates;" that the ad program "could be viewed as demonstrating a preference for one of the debating candidates;" that the "project was timed to target specific voters on a multi-state level at the stage of a political campaign most likely to influence the decision of voters in favor of one presidential candidate over another;" and that "the message represents a clarion call to act in November, and act could readily mean vote, and specifically, vote for a change. The candidate closely identified with the message of the ads is Walter Mondale since his candidacy would represent a change from that of Ronald Reagan." After all that, the Service "reluctantly" ruled that the organization "probably did not intervene in a political campaign on behalf of or in opposition to a

candidate for public office."⁶⁵ Perhaps this means that the IRS and I would come to the same conclusion on this last hypothetical, but I don't really think so. The Private Letter Ruling is old, non-precedential, and seemingly aberrant. Given the IRS position that campaign intervention does not require "express advocacy" and that whether an otherwise educational activity constitutes campaign intervention turns on the purpose for engaging in the activity, and the Service's recent tendency to describe the reach of the campaign intervention proscription quite broadly and flexibly,⁶⁶ it seems quite possible that the IRS would find that the activities of our hypothetical organization violate section 501(c)(3). Furthermore, the relationship between our hypothetical section 501(c)(3) organization and its parent PAC (for which there was no parallel in the Private Letter Ruling) will almost certainly identify the project as campaign intervention.

What makes it difficult to arrive at a solid descriptive answer - what will the IRS do? - or a solid normative answer - what should the IRS do when faced with this situation? - is that the determination of whether certain activities constitute pursuit of private benefit or prohibited campaign intervention turns on the purpose for engaging in those activities, and "purpose" is often circular. Is the organization's purpose to elect candidates, in order to promote certain policy results? To promote certain policy results, with election of like-minded candidates a desirable, and maybe necessary, strategy? If the election of like-minded candidates is a necessary strategy to achieve certain policy results, must an organization's purpose in trying to bring the public to understand and prefer its desired policy positions be

65. Private Letter Ruling 8936002 (May 29, 1989).

66. See, e.g., Internal Revenue Service News Release IR-96-23 (Apr. 24, 1996).

seen as the election of those like-minded candidates? Gingrich and his various counsel say "no," so long as the activities of the organization are not specifically election-focused. I would tend to agree.⁶⁷

If we focus on purpose instead of activities, as the Cole Report's summary of applicable law⁶⁸ suggests we should, and as the IRS probably would if it looked at these scenarios, it is difficult to come up with a principled way to decide which part of the circle to focus on. As the law stands now, organizations are clearly permitted to engage in efforts to bring the public to understand and prefer the organization's policy positions, but efforts to encourage the public to connect those preferences to political action cross a forbidden line. I have argued before that, although a prohibition on spending deductible dollars for express candidate support or opposition is appropriate, we ought to understand section 501(c)(3) (and rewrite it, if necessary) to permit an organization to engage in efforts to bring the public to understand and prefer the organization's policy positions and to encourage the public to connect those preferences to political action. If we take away the evidence of specific

67. Compare the comments of Federal Election Commissioner Josephiak with respect to the desirability of using extreme caution in relying on assessments of the "purpose" behind ambiguous behavior in the context of applying the FECA:

The question of whether activity is a contribution or expenditure under the Act should almost never turn on subjective notions about the nature and purposes of the one engaging in it; an assertion of the Commission's jurisdiction should almost always rely upon an objective review of the nature and purposes that are reasonably evident from the activity itself.

Fed. election Comm'n Adv. Op. No. 1988-22, Fed. Election Camp. Fin. Guide (CCH) ¶ 5932 (Josephiak, concurring).

68. Appendix, Summary of Law Pertaining to Organizations Exempt from Federal Income Tax Under Section 501(c)(3) of the Internal Revenue Code, Cole Report at 99-127.

appropriation of the ACTV and Renewing American Civilization activities for election-related purposes (for example, special efforts to establish workshop sites in Gingrich's district and GOPAC's claim of de facto ownership of the projects as a strategy for electing conservative Republicans), this seems to be exactly what ACTV and Renewing American Civilization were about.⁶⁹ Certainly, this is the picture that Gingrich and his various counsel draw of what ACTV and Renewing American Civilization were about.

If the IRS does respond to the invitation to look into the behavior of the section 501(c)(3) organizations that were implicated in Gingrich's actions, it may very well describe the reasons for its conclusions in broad, vague terms of "purpose," rather than by focusing on the particular activities that pretty clearly constitute campaign intervention. That would be unfortunate.

The better approach is to focus on activities, e.g., timing and geographical targeting of the organization's showcasing of a candidate, or explicit linking of an issue-oriented message to particular candidates in a way that would hold up as "express advocacy" under the FECA. This approach would give us a clearer way to distinguish between campaign intervention and issue advocacy (even where that advocacy is connected to an understanding that policy positions may need to be connected to political engagement), without discouraging the vital and legitimate advocacy role of the nonprofit sector. It may also let by some activity that really does have the purpose of electing particular candidates, but is cleverly enough masked

69. And it is this picture of what ACTV and Renewing American Civilization were about that Gingrich and his various counsel describe to support their opinions that there were no section 501(c)(3) violations. The difference between their position and mine is that they ignore the smoking guns.

to avoid fitting the narrower criteria - perhaps Hypothetical #2, and maybe even Hypothetical #1. In any case, even after Gingrich, I would rather miss catching an occasional overreacher than describe the limits in terms that discourage legitimate advocacy - my inclination is to opt for erring on the side of political inclusiveness. I continue to be convinced that regulating the behavior of section 501(c)(3) organizations is neither an effective nor a desirable way to frame efforts to clean up politics. Given the ambience of campaign politics in recent years, I think we can count on there always being someone like Gingrich to push the envelope, no matter what the rules are. In the end, that kind of behavior tends to be self-limiting - press attention and other forces (examples here are the reaction of the Kennesaw State faculty, the ultimate recognition by Reinhardt College officials that the kind of attention the school's participation in Renewing American Civilization drew is not likely to enhance the school's reputation after all, and the application of Congressional ethics rules) are more effective deterrents than section 501(c)(3) rules. To try to cabin those who test the limits by writing and interpreting the rules in terms more broad, vague, and flexible than necessary will likely deter those who make a point of trying to toe the line, even at the expense of maximizing the effectiveness of their organizations, but won't necessarily preclude the next strategy of the people who aim to be "entrepreneurial" and "risk-taking."