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With Charity for All

Oliver A. Houck†

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INTRODUCTION

This is a study of public interest law and its practice by a group of inter-related legal foundations that were created, funded, and remain largely directed by leaders of American business corporations. The question raised is the extent to which their practice is consistent with accepted notions of charity under federal tax laws and with the more particular requirements for public interest law firms.

Few areas of law are more elusive than the regulation of exempt organizations under section 501(c) of the Internal Revenue Code. The section is broad and within it one finds separate provisions for, among others, churches and hospitals, civic leagues and veterans organizations, labor unions, irrigation companies, animal shelters, and benevolent life insurance associations. In common, these are non-profit organizations: They work for something other than their own financial gain. In return, they receive an assortment of tax advantages, including exemption from federal income taxes. Within this spectrum of exempt organizations, however, is a most-advantaged class, those qualified under section 501(c)(3) as public charities, organized and operated for "religious, charitable, scientific, testing for public safety, literary, or educational purposes, or for the prevention of cruelty to children or animals." Contributions to these public charities are exempt to the donor. In the eyes of the Code and of the public at large, these organizations are the most worthy of all.

The Internal Revenue Service has long recognized the practice of law in pursuit of charitable goals as an exempt activity. The American Civil Liberties Union and the National Association for the Advancement of Colored People have been so engaged beyond the lifetimes of most attorneys active today. By the late 1960's, however, a growing number of organizations formed exclusively to litigate issues as diverse as child care, prison reform, and clean air forced the Service to come to grips with the question of when such litigation *was* in the public interest, and thus to be recognized as charitable under section 501(c)(3) of the Code. In 1970, after several false starts, the Service arrived at perhaps the only definition of public interest legal practice consistent with its prior exemptions and intellectually tenable amidst the rising clamor for recognition from organizations that were fiercely ideological, at times in flat opposition to each other, and at all times claiming to represent the best interests of the American public. Public interest law firms were qualified not by their particular ideology but by the service they performed, the representation of otherwise underrepresented interests at the bar.

The years which followed have seen few refinements. The Internal Revenue Service has issued no further regulations and only a handful of revenue rulings on the subject. Audits have led to the disqualification of no firm in practice. The field has risen and ebbed with dozens of firms

established to represent one or more under-financed interests in the life of the country, maintaining a base of about 100 organizations. The most significant development since 1970 has been a new breed of public interest organizations fashioned closely after the older ones but, for the first time, founded, financed, and presided over by the chief executives and counsel for such entities as Exxon, ARMCO, and General Motors, the chemical, mining, and construction industries, public and private utilities, national and international banks, the most powerful economic forces in America. The forerunner of this breed was the Pacific Legal Foundation, established in Sacramento, California, and qualified as a public charity in 1973. Within the next few years, under the aegis of a group of corporate executives formed as the National Legal Center for the Public Interest, the Pacific Legal model was adopted for the Mountain States Legal Foundation (Denver), the Gulf and Great Plains Legal Foundation (Kansas City, Missouri), the Mid-American Legal Foundation (Chicago), the New England Legal Foundation (Boston), the Southeastern Legal Foundation (Philadelphia), and the Capital Legal Foundation (Washington, D.C.).

This new form of public charity presents, or should present, the Service with its second major challenge in public interest law. The creation of these firms by corporate leaders should not by itself be disqualifying, nor should their participation in an at least limited fashion on the organizations' directing bodies. Major funding of these firms by corporations and their foundations is likewise, within reason, no bar. What causes the most serious difficulties, or should cause them, is the conduct of these firms, the cases they have undertaken, a high percentage of which are indistinguishable from those of their business sponsors, and a smaller but still disturbing percentage of which appear to be on behalf of the very corporations that are their major donors and that sit on their directing boards. How the Service's definition of public-interest practice applies to firms which in substantial measure support the objectives of these corporate interests and, as they characterize their actions, those of the free-enterprise economic system, is at the heart of this investigation.

Excluded from this study are the merits of the legal actions involved, for essentially the same reasons which lead the Service to find another means of defining public interest practice. One person's good is another's bad, a diversity long recognized as a strength of American democracy. Other data do emerge, however, which, while only incidental to the inquiry, may be of interest. At an aggregate funding of approximately \$14 million over six years, the seven firms associated with the National Legal Center for the Public Interest have involved themselves in 227 identified legal actions. The Pacific Legal Foundation, which has received roughly

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equivalent funding since 1973, adds another 167 actions.¹ Only a handful of cases were initiated by these PILFs directly and in less than one half did they participate as parties; the majority were appearances as amicus curiae. Almost two-thirds of these cases concerned resource development and the environment. The central focus of this study, however, is the conformance of these actions to those standards which define public interest law. On this measuring stick, the business-sponsored firms do not fare well. Overall, only 102 cases (30%) were rated consistent with IRS standards; 58 cases (17%) were found questionable; 179 cases (53%) were found invalid.²

These generalizations form a preliminary description of this study. They will not reappear until an understanding is reached of the policies by which the evaluations were made. The study accordingly begins with the historic concept of charity and its development under the Code. It proceeds next to the development of public interest law in this country, and under the Service's rulings. It will then examine the business-sponsored PILFs. Appendices to the study provide the methods of research used to assemble data on these firms, the interpretation of the Service's guidelines used to evaluate their cases, and a summary of results. The final section draws conclusions on these results, and considers several approaches for reconciling them within the field of exempt organizations.

At the risk of over simplifying these conclusions, it seems appropriate to say that more than two years of study have persuaded this author that public interest law practice reflects deeply-rooted traditions in Anglo-American history and almost a century of American law. The current practice by the business-sponsored firms is at the very least on the fringe of these traditions. Whether it is a leading edge or a corruption will depend on one's point of view. The only question capable of being resolved in this study is whether that edge is within, or without, the law.

I. TOWARDS AN UNDERSTANDING OF CHARITABLE ORGANIZATIONS UNDER THE INTERNAL REVENUE CODE

[A]lso we certify you, that touching any of the priests and Levites, singers, porters, Nethinim, or Ministers of this House of God, it shall not be lawful to impose toll, tribute, or customs upon them.³

1. These data reflect an investment of \$71,000 per case, or approximately \$130,000 per case with appearances as amicus curiae excluded. Statistics such as these of course do not reveal the full extent of legal activity, either on single, large cases or on administrative proposals and legislation.

2. As explained below, a number of the cases identified in the course of this study were not evaluated due to insufficient information. In all, 55 cases were not rated for this reason, 35 of them cases of the Pacific Legal Foundation. The evaluation totals are shown by firm in Appendix I.

3. *Ezra* 7:24 (King James) (emphasis added).

A. *An Historical Perspective*

In history's long conflict between governments and taxpayers there have always been sanctuaries, off limits to the tax collector, for private activities considered charitable because they served a public need. Remarkably, the sanctuaries have looked much the same: a consensus, in Anglo-American history at least, on those public services which should be encouraged, perpetuated, and exempt from taxation.⁴ This consensus has formed the legal meaning of charity. The preamble to the English Statute of Charitable Uses in 1601 recognized the following as charitable functions:

some for relief of aged, impotent and poor people, some for maintenance of sick and maimed soldiers and mariners, schools of learning, free schools, and scholars in universities, some for repair of bridges, ports, havens, causeways, churches, seabanks and highways, some for education and preferment of orphans, some for or towards relief, stock or maintenance for houses of correction, some for marriages of poor maids, some for supportation, aid and help of young tradesmen, handicraftsmen and persons decayed, and others for relief or redemption of prisoners or captives, and for aid or ease of any poor inhabitants concerning payments of fiteens, setting out of soldiers and other taxes.⁵

The controlling description in this country is now found in regulations of the Treasury Department,⁶ which provide the following illustrations:

4. Charitable Uses Act, 1601, 43 Eliz., ch. 4. The question of charitable activities arose at common law from the area of gifts and trusts. The original question, and the one addressed in the Statute of Uses, was whether a trust which had no specific beneficiary but was instead intended to serve the poor, or to maintain a local roadway, should be recognized at law. *See, e.g.,* *Inland Revenue Comm'rs v. National Anti-Vivisection Soc'y*, [1945] 2 All. E.R. 529 (K.B.), *aff'd*, [1946] 1 All E.R. 205 (C.A. 1945); G. JONES, *HISTORY OF THE LAW OF CHARITY 1532-1827*, at 16-52 (1969). The 1601 Statute deemed that such a trust should be permitted, and subsequent decisions on both sides of the Atlantic have concerned themselves with whether particular arrangements of this type fall within the permitted class. *See* 4 A. SCOTT, *THE LAW OF TRUSTS* § 368 (3d ed. 1967). This body of law defining charitable functions was incorporated into the tax laws of the United States, as a class of tax-exempt activities, in 1913. *See* Rainey & Henshaw, *Exempt Organizations: A Survey*, 19 S. TEX. L.J. 205, 219 (1978); *see also* Simon, *The Tax Exempt Status of Racially Discriminatory Religious Schools*, 36 TAX L. REV. 477, 485-89, (1981) (cited in *Bob Jones Univ. v. United States*, 103 S. Ct. 2017, 2026 n.12 (1983)) ("The form and history of the charitable exemption and deduction sections of the various income tax acts reveal that Congress was guided by the common law of charitable trusts.").

5. 43 Eliz., ch. 4. These same activities are said to have been recognized by the codes of Rome, Greece, early Judaism, and "other early cultures and religions." B. HOPKINS, *THE LAW OF TAX-EXEMPT ORGANIZATIONS* 46 (3d ed. 1983).

6. In the United States, the question of exempting activities from taxation—for charitable or any other purposes—arose at the turn of this century with proposals for an across-the-board tax on income in 1894. *Tariff Act of 1894*, ch. 349, §§ 27-33, 28 Stat. 509, 553-57. Previously, with the exception of income taxes levied during the Civil War, the United States had raised its revenue through individual customs and excise taxes on specific commodities. Activities not specified were by definition exempt. *See* McGovern, *The Exemption Provisions of Subchapter F*, 29 TAX LAW. 3, 523, 524-25 (1976). Once income was to be taxed, however, it became necessary to describe those activities

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relief of the poor and distressed or of the underprivileged; advancement of religion; advancement of education or science; erection or maintenance of public buildings, monuments, or works; lessening of the burdens of Government; and promotion of social welfare by organizations designed to accomplish any of the above purposes, or (i) to lessen neighborhood tensions; (ii) to eliminate prejudice and discrimination; (iii) to defend human and civil rights secured by law; or (iv) to combat community deterioration and juvenile delinquency.⁷

From 1601 to 1982, few changes can be observed in the concept or the language of charity.

The rationales offered for exempting charitable activities from taxation have been more varied. The force of history aside, it has simply seemed immoral to tax, for example, revenue dedicated to services for the poor. In Senate debate almost a century ago on the taxation of mutual savings banks, a proponent declared that “argument ought not be necessary” for their exemption: “They represent the savings of the poor; they are not established for ordinary business purposes.”⁸ To tax them would be “the crowning infamy” of the law.⁹ To Harvard University’s President Eliot, an 1874 proposal to revoke Massachusetts’ charitable exemption laws was both “illogical and mean”: illogical because “if churches, colleges and hospitals subserve the highest public ends, there is no reason for making them contribute to the inferior public charges,” and mean because “it deliberately proposes to use the benevolent affections of the best part of the community as a means of getting out of them a very disproportionate share of the taxes.”¹⁰ Courts and commentators have agreed.

Several writers stress the contributions of “volunteers and pluralism” to American society.¹¹ Charities work through volunteers, thousands of organizations, millions of individuals creating and maintaining schools, libraries, parks, public health, clinics, integral parts of the American social support system, many of which the government cannot provide fully,¹² or as

which should be excluded as, among other reasons, charitable.

7. Treas. Reg. § 1.501(c)(3)-(d)(2) (1960).

8. 26 CONG. REC. 6622 (1894).

9. *Id.*

10. C. Eliot, *The Exemption from Taxation* (1894) (paper delivered to the Commissioners of the Commonwealth of Massachusetts), quoted in Bitker & Rahdert, *The Exemption of Nonprofit Organizations From Federal Income Taxation*, 85 YALE L.J. 299, 332 (1976).

11. B. HOPKINS, *supra* note 6, at 7; see *Green v. Connally*, 330 F. Supp. 1150, 1162 (D.D.C. 1971).

12. See H.R. REP. NO. 1860, 75th Cong., 3d Sess. 19 (1938). (“The exemption from taxation of money or property devoted to charitable and other purposes is based upon the theory that the Government is compensated for the loss of revenue by its relief from financial burden which would otherwise have to be met by appropriations from public funds, and by the benefits resulting from the promotion of the general welfare.”); see also *McGlotten v. Connally*, 338 F.Supp. 448, 456 (D.D.C. 1974) (“[T]he Government relieves itself of the burden of meeting public needs which in the absence of charitable activity would fall on the shoulders of the Government.”).

well,¹³ or perhaps at all.¹⁴ The government receives far more in the “free services” of these organizations than it would recoup in taxing and presumably suppressing them.¹⁵ Support for the exemption also comes from those who have looked pragmatically at the prospect of taxing charities. Legislators have seen “meager potential” in these organizations as revenue sources, and a major “nuisance of recordkeeping” in attempting to collect it.¹⁶ Tax scholars have noted that prevailing theories of income taxation cannot be applied to the revenues of charities; there are no suitable measures for a “net income” or a tax rate for groups not organized for profit.¹⁷

This brief glance at the nature of charitable exemptions reveals, then, no random assortment of loopholes secured by special interests but rather a judgment of considerable lineage on—to reduce it to its essence—what is both worthy and needs help. From this same background a picture of what qualifies as charitable activity starts to emerge. The picture is clearer at the core than on the periphery.¹⁸ It has been developed in com-

13. For a statement of the charities-do-it-better perspective, see STAFF OF SENATE COMM. ON FINANCE, 89TH CONG., 1ST SESS., TREASURY DEPT. REPORT ON PRIVATE FOUNDATIONS 12-13 (Comm. Print 1965) (charities more efficient than government because they operate under conditions of greater freedom, innovation, and incentive).

14. As the Supreme Court has recently phrased it: “Charitable exemptions are justified on the basis that the exempt entity confers a public benefit—a benefit which the society or community may not itself choose or be able to provide, or which supplements and advances the work of public institutions already supported by tax revenues.” *Bob Jones Univ. v. United States*, 103 S. Ct. 2017, 2028 (1983).

15. “For every dollar that a man contributes to these public charities, educational, scientific or otherwise, the public gets 100 percent.” 55 CONG. REC. 6728 (1917) (remarks of Sen. Hollis in debate on tax exemptions).

16. Bittker & Rahdert, *supra* note 10, at 304; McGovern, *supra* note 6, at 526. This assumption appears questionable in light of the sizable incomes of some of today’s larger operating charities; the gross revenue of the National Wildlife Federation in 1981 exceeded \$30 million. In 1981, an estimated \$11 billion was foregone to the Treasury from the deductions available to donors to charitable organizations. Kaus, *How is Bob Jones U. Like Ms. Magazine?*, AM. LAW., Apr. 1982, at 63. One difficulty in taxation of these organizations is drawing a line between those fewer larger operations which might produce meaningful tax revenue and the great many from which the revenue would not justify the paperwork at either end. A line based on the size of the income would in effect be based on the success of the charity, penalizing those organizations that the public sees as providing the best services and therefore attracting the most public contributions. This penalty is but one of the conceptual difficulties in taxing charitable income raised in Bittker & Rahdert, *supra* note 13.

17. *Id.* at 307-16. These last arguments, of course, apply beyond charities to all non-profit organizations. In other words, in performing their services, the money received by charities is not received as income but merely passed through to the beneficial end. See B. HOPKINS, *supra* note 6, at 15. This being so, there has been no “taxable event”; “no income of the sort usually taxed has been generated.” *McGlotten v. Connally*, 338 F. Supp. 449, 458 (D.D.C. 1972).

18. As for the difficulties in defining charitable activities on the periphery: “Probably no other one area of the Revenue Code has been more consistently troublesome for the [Internal Revenue] Service to administer or proportionately more demanding of the time of senior Service personnel than that of charitable organizations.” *Tax Exemptions for Charitable Organizations Affecting Poverty Programs: Hearings Before the Subcomm. on Employment, Manpower, and Poverty of the Senate Comm. on Labor and Public Welfare*, 91st Cong., 2d Sess. 141 (1970) (testimony of Mitchell Rogovin) [hereinafter cited as *Senate Hearings*].

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mon-law fashion by individual decisions over a long period of time.¹⁹ It is a fluid picture, and may expand and contract with the values of society.²⁰ These qualifications noted, charitable organizations are seen to do for people what people cannot do individually and for themselves. They do what is not otherwise being done in the society. Their ends are not “ordinary business purposes”;²¹ they are in a larger sense public, and publicly supported.

These few generalizations form a stage. They are what we have understood for centuries to be so deserving as to escape taxation. It is on this stage that section F of the Internal Revenue Code dealing with exempt organizations performs.

B. *Public Charities and the Internal Revenue Code*

*In my own case the words of such an act as the Income Tax, for example, merely dance before my eyes in a meaningless procession: cross-reference to cross-reference, exception upon exception—couched in abstract terms that offer no handle to seize hold of—leaving in my mind only a confused sense of some vitally important, but successfully concealed, purport*²²

Judge Learned Hand

The Internal Revenue Code favors charitable organizations in several important ways. Some of these tax advantages are extended to a wide spectrum of organizations not operated for private profit. Others are restricted to a smaller class.

19. Former Internal Revenue Commissioner Thrower testified:

In the general body of charity law, the characterization of objects as charitable has been largely by judicial decision. . . . [T]he principles and the fact that its application has been uniquely a judicial, rather than a legislative, determination is fundamental to both English and American jurisprudence.

Id. at 57. The Supreme Court has recently reemphasized the common-law nature of the requirements for charity, denying qualification to a private school on grounds of racial discrimination as “contrary to public policy.” *Bob Jones Univ. v. United States*, 103 S. Ct. 2017, 2030–31 (1983). “Underlying all relevant parts of the Code is the intent that entitlement to tax exemption depends on meeting certain common law standards of charity.” *Id.* at 2026. For a criticism of the flexibility inherent in this approach, see Yaffe, *The Revocation of Tax Exemptions and Tax Deductions for Donations to 501(c)(3) Organizations on Statutory and Constitutional Grounds*, 30 *UCLA L. REV.* 156 (1983).

20. *Porter v. Baynard*, 158 Fla. 294, 28 So. 2d 890, 894 (“the courts should be left free to apply the standards of the times—on the theory that what is charitable in one generation may be noncharitable in a later age, and vice versa”), *cert. denied*, 330 U.S. 844 (1946); *accord*, A. SCOTT, *supra* note 4, § 368.

21. See *Trinidad v. Sagrada Orden*, 263 U.S. 578, 581 (1924) (“Evidently the exemption is made in recognition of the benefit which the public derives from corporate activities of the class named, and is intended to aid them *when not conducted for private gain.*”) (emphasis added).

22. Hand, *Thomas Walter Swan*, 57 *YALE L.J.* 167, 169 (1947).

1. *Income Tax Exemptions*

Subchapter F of the Code, sections 501 through 527, exempts non-profit organizations from federal income tax. Section 501(c) lists twenty-two categories of organizations eligible for exemption, ranging from chambers of commerce to farmers collectives to churches, trade unions, trusts, credit unions and cemetery companies.²³

Section 501(c)(3), a dominant category in this spectrum, exempts the income of a class which includes charities in the following fashion:

Corporations, and any community chest, fund, or foundation, organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes, or to foster national or international amateur sports competition (but only if no part of its activities involve the provision of athletic facilities or equipment), or for the prevention of cruelty to children or animals.²⁴

From tax and other standpoints, this is the most advantageous class of exempt organizations and, in fiscal year 1982, over 322,000 organizations were recognized as exempt in this category.²⁵ By comparison, 841,440 organizations were exempt in all categories of section 501(c).²⁶ Even these figures understate the relative importance of public charities qualified under section 501(c)(3); a single exemption to the United States Catholic Conference, for example, includes over 70,000 subordinate churches and administrative units.²⁷ The large number of organizations under this subsection reflect in part the breadth of its language. They also reflect a national instinct for "doing good."

The Code provides no definition of the "charitable purposes" exempted by section 501(c)(3), or for that matter "religious," "educational" or other eligible purposes. These matters are left to Treasury regulations and interpretative rulings.²⁸ Among the regulations and rulings defining "chari-

23. I.R.C. §§ 501(c)(1)-(22) (1982).

24. I.R.C. § 501(c)(3) (1982).

25. I.R.S. 1982 ANNUAL REPORT OF THE COMMISSIONER AND CHIEF COUNSEL OF THE INTERNAL REVENUE SERVICE at 60 (table 20).

26. *Id.*

27. McGovern, *supra* note 6, at 528 n.29.

28. The question has also led to recurring litigation and commentary. The U.S. Court of Appeals for the District of Columbia Circuit has recently found the Treasury definition of "educational" organizations unconstitutionally vague. *Big Mama Rag, Inc. v. United States*, 631 F.2d 1030 (D.C. Cir. 1980); see Note, *Tax-exempt Status for Educational Organizations—the Definition of Education Organizations in Treasury Regulation Section 1.501(c)(3)-(d)(3) is Unconstitutionally Vague in Violation of the First Amendment*, 49 GEO. WASH. L. REV. 623 (1981). Similar difficulties arise with the meaning of "religious" purposes. See, e.g., *Founding Church of Scientology v. United States*, 412 F.2d 1197 (Ct. Cl. 1969) ("religious" issue avoided by relying on other grounds for disqualification), *cert. denied*, 397 U.S. 1009 (1970); Peacock, *Emerging Criteria for Tax-Exempt Classification for Religious Organizations*, 60 TAXES 61 (1982); Whelan, "Church" in the Internal Revenue Code: The Definitional Problems, 45 FORDHAM L. REV. 885 (1977). Equally difficult definitional problems

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table purposes” are those providing for the eligibility of public interest law firms.²⁹ Section 501(c)(3) however, does impose other statutory requirements on all qualified organizations which limit their conduct and to that extent further define their nature.

Most relevant to the firms examined in this study is a prohibition on private inurement: “[N]o part of the net earnings” of a qualified organization may inure “to the benefit of any private individual or shareholder.” The trigger for this prohibition is an “insider,” one who by virtue of his position can control or influence an organization’s action.³⁰ Where proceeds from a charity’s activity are diverted to such an individual, the disqualification is obvious.³¹ Where the *services* of a charity are involved, as opposed to its proceeds, the prohibition becomes more ambiguous. The Service has ruled against a manufacturers organization which tested drugs,³² and an association of nurses which maintained a nurses registry, as serving the private interests of their members.³³ Yet the Service has qualified a public park which carried the name of its corporate donor, finding the corporate (public relations) benefit “incidental” to the public use. However the line is drawn in a given instance, two points emerge with clarity. The first is that the IRS will include in its “insider” class

arise in the concept of “charity” itself. As defined in the Treasury Regulations, charitable purposes include, for example, “advancement of religion” and “advancement of education or science.” Treas. Reg. 1.501(c)(3)-(d)(2) (1960). These are, of course, the same activities which the Internal Revenue Code itself exempts *in addition* to charitable purposes. Is then “charitable” a general class which includes all of the others in § 501(c)(3)? If so, are “educational” organizations, for example, discriminated against by the imposition of separate, additional regulatory requirements? See Comment, *Tax Exemptions for Educational Institutions: Discretion and Discrimination*, 128 U. PA. L. REV. 849 (1980). The Treasury regulations and the IRS Exempt Organizations Handbook take the position that “charity” does not swallow the class, and that activities separately enumerated in the Code, as is, for example, “education,” are properly subject to further requirements. Treas. Reg. § 1.501(c)(3)-(d)(2) (1960) (“the term “charitable” is . . . not to be construed as limited by the separate enumeration in Section 501(c)(3) of other tax-exempt purposes”); I.R.S., EXEMPT ORGANIZATIONS HANDBOOK § 342(4) (1983). Under this rationale, the Treasury Department retains the flexibility to specify separate qualifications for “educational,” “religious,” and other § 501(c)(3)-listed purposes, and for purposes beyond these which it perceives as “charitable”—including public interest law firms.

29. See, e.g., Rev. Rul. 71-13. See *infra* §§ II B., II. C.

30. See, e.g., Rev. Rul. 69-383, 1969-2 C.B. 113; B. HOPKINS, *supra* note 5, at 160. A charity of course confers benefits on private individuals every day. Only when the benefactor is in a position to influence the decision does a private inurement question arise. This prohibition is also reflected in the Service’s more general regulations on permissible exempt purposes: An organization must show that it is not benefiting its creators, shareholders, or “persons controlled, directly or indirectly, by such private interests.” Treas. Reg. §§ 1.501(c)(3)-(d)(1)(ii) (1960). The possible overlap between non-exempt purposes and private inurement has caused some to question whether the latter has any separate meaning. See Note, *The “Inurement of Earnings to Private Benefit” Clause of Section 501(c): A Standard Without Meaning?*, 48 MINN. L. REV. 1149 (1964). In the context of a public interest law firm, however, private inurement does seem to have separate significance. Litigation otherwise “public” in nature may be tainted by the private benefit of a firm’s director or major donor.

31. Founding Church of Scientology v. United States, 412 F.2d 1197 (Ct. Cl. 1969) (founder of church and family received substantial monies characterized as fees, commissions, rent, and unexplained payment), *cert. denied*, 397 U.S. 1009 (1970).

32. Rev. Rul. 68-373, 1968-2 C.B. 206.

33. Rev. Rul. 61-170, 1961-2 C.B. 112.

individuals such as donors and directors who may influence a charity's decisions. Secondly, if a private benefit to such a person is found, it will be examined closely. The statute states that "no part" may inure. There is no modifier.³⁴

2. Contributions and Deductions

Section 501(c)(3) organizations operate largely on contributions from the general public. While the larger churches, educational institutions, hospitals, and charities may also receive considerable revenue from endowments, service fees, and membership dues, it is safe to say that without public donations their activities would be severely curtailed and the more numerous, smaller groups would simply disappear.³⁵ The sum of these contributions to public charities is impressive, and was estimated almost ten years ago at \$26 billion a year.³⁶ Contributors are moved to such generosity, in part, by the fact that they may deduct their donations from their personal income taxes.³⁷ For the majority of public charities, the exemptions from income tax afforded under section 501(c)(3) are not nearly so important as these deductions available under section 170 to their donors.³⁸

34. The Code imposes other restrictions on charities, with varying degrees of flexibility. A qualified organization may not devote a "substantial" part of its activities to lobbying, § 501(c)(3), § 501(h), nor may it "participate in, or intervene in (including publicity or distributing of statements), any political campaign on behalf of any candidate for public office," § 501(c)(3). It may conduct "substantial" business activities only if they are "in furtherance of the organization's exempt purpose," Treas. Reg. §§ 1.501(C)(3)-1(e)(1) (1983). It must receive a minimum level of support from the general public, § 504(a)(2), interpreted as at least one-third of the total received, Treas. Reg. § 170A-9(e)(2) (1973). The application of these restrictions to charities has been questioned, see Troyer, *Charities, Law-Making and the Constitution: The Validity of the Restrictions on Influencing Legislation*, 31 N.Y.U. INST. ON FED. TAX'N 1415 (1973), but upheld, at least with respect to lobbying, *Regan v. Taxation With Representation*, 103 S. Ct. 1997 (1983).

35. Caplin & Trimble, *Legislative Activities of Public Charities*, 39 LAW & CONTEMP. PROBS. 183, 195 (1975) (loss of deductible contributions is "tantamount to a death sentence"); B. HOPKINS, *supra* note 5, at 30.

36. Comm'n on Private Philanthropy & Public Needs, *Giving in America — Toward a Stronger Voluntary Section 34* (1975) (unpublished manuscript) [hereinafter cited as *Giving in America*]. This figure does not include corporate gifts, foundation support, endowment, service fees, or dues.

37. Tax deductions for contributions to charities appeared early in the Code, see Tax Revenue Act of 1917, ch. 63, 40 Stat. 300, 330 (now codified at I.R.C. § 170 (1982)), only four years after the Tariff Act of 1913, and have since remained. I.R.C. § 170(a) allows deductions for "any charitable contribution," and § 170(c) defines these contributions as ones to organizations with "religious, charitable, scientific, literary, or educational purposes," the promotion of amateur sports, and prevention of cruelty to children and animals. I.R.C. § 701(a)-(c) (1982). With minor exceptions these are the same purposes found in § 501(c)(3), and § 170(c) imposes the same limitations on private inurement, lobbying, and political activity. Analogous Code provisions exempt these donations from gift and estate taxes. *Id.* §§ 2522, 2055. Contributions are limited in amount to a percentage of the donor's adjusted gross income, fifty percent for gifts to qualified charities. *Id.* § 170(b)(1)(A). Contributions by corporations may not exceed five percent of their adjusted taxable income. *Id.* § 170(b)(2).

38. See, e.g., *Bob Jones Univ. v. Simon*, 416 U.S. 725, 729-30 (1974) (contributors "simply will not make donations" to non-qualifying organizations); Clark, *The Limitation on Political Activities: A Discordant Note in the Law of Charities*, 46 VA. L. REV. 439, 445-6 (1960) (since income of these groups tends to be totally consumed in their operations, it is, in practice, deductibility of contributions,

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The Internal Revenue Service publishes and regularly updates a list of all organizations qualified under section 170.³⁹ Inclusion on this list is not only the primary benefit for public charities but also one which is reserved for them exclusively, a major advantage in the competition for the public dollar.

3. *Fringe Benefits and White Hats*

Beyond the income tax exemption and deductions for contributors, section 501(c)(3) status confers other benefits which, in the aggregate, can be substantial. Services performed for these organizations may be exempt from federal social security taxes⁴⁰ and federal unemployment taxes.⁴¹ Foundation grants to these organizations are encouraged through provisions which hold private foundations responsible for the activities of each of their donees, *except* for those of section 501(c)(3) charities.⁴² Similarly, federal agencies will make grants only to these tax-exempt organizations.

Advantages beyond the Code itself may be equally important. Charities are frequently exempted from state and local income, property, sales, and use taxation.⁴³ Qualified organizations are also eligible to participate in, and receive substantial funding from, the Combined Federal Campaign.⁴⁴ The United States Postal Service is inclined to equate section 501(c)(3) status with eligibility for its preferred (lower) second and third class mailing rates.⁴⁵ For those charities engaged in education and the distribution of publications, and for the increasing number of charities relying on direct-mail fundraising, these postal rates may constitute as important a savings as their income tax exemptions.

From all of these benefits, and perhaps underlying them all, comes yet a final one which, while difficult to quantify, is very much at work in the public arena in which these organizations operate. A qualified charity is placed on a pedestal above all other exempt organizations and above the many more non-exempt corporations in this country. The Code declares in effect, and history concurs, that these organizations do good works.

not income tax exemption, that is controlling).

39. IRS, IRS PUBLICATION NO. 78: CUMULATIVE LIST OF ORGANIZATIONS DESCRIBED IN SECTION 170(C) OF THE INTERNAL REVENUE CODE OF 1954.

40. I.R.C. § 3121(a) (1982).

41. *Id.* § 3306. Employees are also eligible for special taxation of annuity provisions of the Code. *Id.* § 403(b). Lotteries and bingo operations, no small considerations for some churches and other charities, are exempt from federal gambling laws. Organized Crime Control Act, 18 U.S.C. § 1955(e) (1982).

42. I.R.C. § 4945(d) (1982).

43. McGovern, *supra* note 6, at 528. Of these, state income tax exemption appears to be the one most automatically granted. Property, sales, and use taxes may be more selective.

44. See NAACP Legal Defense and Education Fund v. Devine, 727 F.2d 1247 (D.C. Cir. 1984).

45. 39 C.F.R. §§ 111.1, 111.5 (1983). For a case challenging the Postal Service requirement for § 501(c)(3) status for its preferred rates, see Sierra Club v. United States Postal Serv., 549 F.2d 1199 (9th Cir. 1977); see also *infra* pp. 1448-49.

They wear white hats. In the marketplace for giving—public, corporate and foundation—this imprimatur goes a long way, even among those who for whatever reason do not seek personal tax deductions under section 170.

There is, moreover, an even larger marketplace for many public charities: the market of public opinion and public opinion-making. Churches promote religion, *their* religion, and increasingly their views on abortion, human and civil rights, arms control, and on political candidates who are sympathetic to their beliefs.⁴⁶ Hospitals and educational institutions compete with each other and with a variety of alternative health-care opportunities. Consumer leagues, environmental protection groups and dozens of other organized and concerned elements of our society promote—indeed have as their primary reason for being—their points of view. Charities are selling and the public is buying. The public—public schools, legislatures, courts and the news media included—is more likely to buy from the ones wearing the white hats.

C. *Civic Leagues and Business Leagues*

Public charities are but one of twenty-two categories of exempt organizations listed in section 501(c). Among the others are two which are often confused with the section 501(c)(3) public charities and with each other: civic leagues described under section 501(c)(4), and business leagues under section 501(c)(6). Each provides an alternative form of exemption which will become important for the PILFs studied here.

1. *Civic Leagues and Social Welfare Organizations*

Section 501(c)(4) exempts “civic leagues” and “organizations not organized for profit but operated exclusively for the promotion of social welfare.”⁴⁷ The primary difference between section 501(c)(3) and (c)(4) groups is that, while (c)(3)’s may not engage in a “substantial” amount of lobbying, (c)(4)’s may lobby without limits. For this freedom the 501(c)(4)’s pay a price: They are not eligible under section 170 to receive tax-deductible contributions. This trade-off may give an action-oriented charity serious pause in deciding under which of these two Code provisions to operate.⁴⁸

46. See, e.g., *Abortion Rights Mobilization v. Regan*, 544 F. Supp. 471 (S.D.N.Y. 1982).

47. Section 501(c)(4) was established as an amendment to the Tariff Act of 1913, ch. 16, § II(g)(a), 38 Stat. 172, and its origins have been traced to contemporaneous testimony of the U.S. Chamber of Commerce pressing for recognition of “civic or commercial” organizations. *Hearings on Tariff Schedules of the Revenue Act of 1913 Before the Subcomm. of the Comm. on Finance*, 63d Cong., 1st Sess. 2001 (1913); see McGovern, *supra* note 6, at 530. A provision exempting employee associations was added in 1924. Revenue Act of 1924, ch. 234, § 231(8), 43 Stat. 282.

48. Service regulations also require that § 501(c)(4) activities, like those of a 501(c)(3) group, do not constitute “primarily” the conduct of “a business with the general public in a manner similar to

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The Service has supplemented the Code with additional requirements for section 501(c)(4) organizations from the Code. "Social welfare," not defined by statute, is said to be promoting the "common good" through "civic betterments and social improvements,"⁴⁹ as opposed to operations "for the benefit of members." In practice, promoting the "common good" means little more than not promoting something aggressively bad.⁵⁰ Further, although social benefit is defined in contrast to the private benefit of an organization's members, section 501(c)(4)'s appear to have greater license than (c)(3)'s to benefit their members so long as a "community" rationale is also present.⁵¹

organizations operated for profit." Treas. Reg. §§ 1.501(c)(4)-1(a)(2)(ii) (1960). This requirement, when combined with the "social welfare" requirement, leads to other rulings which in effect prohibit private inurement similar to the explicit Code requirement in § 501(c)(3). *E.g.*, Rev. Rul. 73-349, 1973-2 C.B. 179 (co-op grocery not qualified); Rev. Rul. 69-385, 1969-2 C.B. 123 (real estate enterprise with proceeds to members not qualified). Although the Code also makes no mention of political activity under § 501(c)(4), the Service has sought to prohibit it. Treas. Reg. 1.504(c)(4)-1(a)(2)(ii) (1960) ("The promotion of social welfare does not include direct or indirect participation or intervention in political campaigns. . . ."). The Service has attempted to deny § 501(c)(4) qualification to organizations which rate candidates on the basis of their social welfare objectives. Rev. Rul. 67-71, 1967-1 C.B. 125. These rulings have been modified more recently to allow a § 501(c)(3) organization—and therefore by implication a § 501(c)(4)—to disseminate the voting records on candidates, without editorial comment, and to publish candidate responses to questionnaires in an unbiased fashion. Rev. Rul. 78-248, 1978-1 C.B. 154. The Service went further in 1980 to allow a § 501(c)(3) organization, the United Churches of Christ, to issue a non-partisan score card rating candidates on issues of importance to the organization. *See Mintz, IRS Reverses Itself, Will Allow Groups' 'Report Cards' on Legislators*, Wash. Post, Oct. 9, 1980, at A7, col. 1. This decision took the form of a private letter ruling, however, providing little value as precedent. More to the point, this letter ruling does nothing at all to resolve the more fundamental question of the Service's statutory authority to restrict the political activities of (c)(4) organizations.

49. Treas. Reg. § 1.501(c)(4)-1(a)(2)(i) (1960). In practice, the goal need not be quite so lofty. The line begins to blur where member benefits arguably serve a broader community as well, as for example in the treatment of homeowner associations formed to improve their common streets and neighborhoods and on which the Service has ruled both for and against § 501(c)(4) qualifications. *See, e.g.*, Rev. Rul. 72-102, 1972-1 C.B. 149 (neighborhood association held exempt); Rev. Rul. 74-99, 1974-1 C.B. 132 ("clarifying ruling" holding such associations were *prima facie* not exempt); B. HOPKINS, *supra* note 5, at 245-49. The rulings swing predictably, on the degree of outside benefit the Service chooses to find from what is primarily a neighborhood activity; the improvement of neighborhoods is almost always related to the improvement of towns and cities generally. There is a similar split in rulings on the eligibility of non-profit community bus services, depending on whether they are viewed as serving the members' personal interests or the larger community's interest in improved transportation. *Compare* Rev. Rul. 55-311, 1955-1 C.B. 72 (bus group ineligible under § 501(c)(4)) with Rev. Rul. 78-69, 1978-1 C.B. 156 (eligible under § 501(c)(4)).

50. On this basis, § 501(c)(4) qualification was denied to an anti-war protest organization which advocated civil disobedience in its operations. Rev. Rul. 75-384, 1975-2 C.B. 204.

51. Rev. Rul. 54-394, 1954-2 C.B. 131. I.R.C. § 501(c)(7) provides separately for non-profit social clubs which operate for the recreation and pleasure of their members. The distinction IRS is called upon to draw here between activities that are "public" and those that are "private" arises with some frequency in another context, government eminent domain actions, where it has been resolved with no great certainty. *Compare* *Berman v. Parker*, 348 U.S. 26 (1954) (condemnation of "blighted" urban area and its resale to private owners sufficiently "public") and *Poletown Neighborhood Council v. City of Detroit*, 19 Env't Rep. Cas. (BNA) 1972 (Sup. Ct. Mich. 1981) (condemnation of residential area for an automobile assembly plant sufficiently "public") with *Hogue v. Port of Seattle*, 341 P.2d 171, 193 (Wash. 1959) (condemnation of private levels by port districts for industrial development essentially "private"). *See* *Berger, The Public Use Requirement in Eminent Domain*, 57 OR. L. REV. 203 (1978); *Comment, The Public Use Limitations on Eminent Domain: An Advance Requiem*,

The section 501(c)(4) category is then a broad one, "limited" in the words of one analyst "only by the imagination of the attorney."⁵² Perhaps for this reason it is also a popular one; 131,578 organizations were exempt under (c)(4) in 1982.⁵³ For a group not primarily concerned with financing itself through tax-deductible contributions (and the derivative benefits of section 501(c)(3) status), section 501(c)(4) would seem to have its attractions.

2. *Business Leagues and Chambers of Commerce*

The earliest income tax legislation in this country applied only to corporations "doing business for profit."⁵⁴ The subsequent Tariff Act of 1913 was not so limited, a point not missed by the Chamber of Commerce, which urged the exemption of non-profit business leagues on the ground of public service.⁵⁵ This rationale underlies Code section 501(c)(6), which currently exempts, inter alia, "business leagues" and "chambers of commerce."⁵⁶ In 1982, the Service recognized 51,065 organizations in this category.⁵⁷

The earmarks of business leagues under section 501(c)(6) are provided in Treasury regulations which require a "common business interest."⁵⁸ Their activities should promote "the improvement of business conditions of one or more lines of business as distinguished from the performance of particular services for individual persons."⁵⁹ As with section 501(c)(4) rulings, the distinction clouds in practice; considerable private benefit is

58 YALE L. J. 599 (1949). Each of these cases involves a mix of private and public beneficiaries. The particular alchemy by which some activities are characterized as "public," and others "private," is difficult to master. Fortunately, as will be seen, the distinction between private and public interest law practice under the Internal Revenue Code does not hinge on so subjective a call.

52. McGovern, *supra* note 6, at 530. This category has been less flatteringly described: "Indeed, in practical application it [§ 501(c)(4)] has largely become a dumping ground for organizations which failed to qualify under § 501(c)(3), but were sufficiently acceptable as engaged in "social welfare". *Senate Hearings, supra* note 18, at 172 (statement of Arnold & Porter).

53. IRS 1982 ANNUAL REPORT OF THE COMMISSIONER AND CHIEF COUNSEL 60 (table 20).

54. Tariff Act of 1894, ch. 349, § 32, 28 Stat. 509, 556. This same legislation also specifically exempted charitable organizations.

55. See McGovern, *supra* note 6, at 531. The Chamber's testimony has thus been found behind two exempt categories established in 1913, §§ 501(c)(4) and 501(c)(6). *Id.* at 530-32.

56. I.R.C. § 501(c)(6) (1982). Real estate boards were added to § 501(c)(6) by the Revenue Act of 1934, ch. 277, § 101(7), 48 Stat. 680, 700, and football leagues in 1966, Act of Nov. 8, 1966, Pub. L. No. 89-800, § 6, 80 Stat. 1515, 15 U.S.C. § 1293 (1982).

57. See *supra* note 53.

58. Treas. Reg. § 1.501(c)(6)-1 (1958).

59. *Id.* This distinction, while similar to that applied in § 501(c)(4) to civic leagues and social welfare organizations, does not require the promotion of a generalized commercial welfare. Rev. Rul. 391, 1959-2 C.B. 151. Indeed, the requirement of a mutually-held business interest has disqualified an association formed to exchange business information among several different trades and professions. *Id.* The Service has stretched this "common line of business" requirement on occasion, to include, for example, an organization formed to promote the acceptance of women in business. Rev. Rul. 76-400, 1976-2 C.B. 153.

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tolerated, so long as a more general rationale is also available.⁶⁰ Business leagues are distinguished from section 501(c)(3) charities on a similar principle. Where a professional trade association primarily conducts educational activities—publications, libraries and speakers programs, for example—it *may* qualify under section 501(c)(3).⁶¹ Where it undertakes an action program designed to benefit the profession as a whole, the appropriate category is section 501(c)(6).

Chambers of commerce, a separate class of organizations within the section 501(c)(6) category, enjoy the same latitude as business leagues but differ from them in one significant respect. For a chamber, the “common interest” is not the economic welfare of a trade but rather that of a geographic area. While neither Code nor regulation defines a chamber of commerce, service rulings impose two requirements: Businesses within the given area must be free to join (or not to join) the organization,⁶² and the community served must have some recognizable composition as a “city” or “a locality, a county, or the like.”⁶³ A qualifying organization’s efforts must be directed at promoting the common economic interest of commercial enterprises in this community.⁶⁴ If this shoe fits, however, there appears to be no requirement that an organization be named a “chamber of commerce” to qualify and enjoy the benefits of section 501(c)(6) exemption.⁶⁵

Section 501(c)(6) organizations face fewer restrictions than their 501(c)(3) and (c)(4) counterparts.⁶⁶ The Code itself prohibits private inurement.⁶⁷ Service regulations add an injunction on engaging “in business

60. See *American Plywood Ass’n v. United States*, 267 F. Supp. 830 (W.D. Wash. 1967). This case involved an association providing quality control and commercial advertising for the plywood trade; the general benefit of this service to the trade was found to outweigh the obvious individual benefits to members of the association. Similarly, the IRS has found an organization of contractors which established a central repository for bids, bid results, and similar information for its members qualified under § 501(c)(6). Rev. Rul. 211, 1972-1 C.B. 150.

61. See Rev. Rul. 506, 1971-2 C.B. 233.

62. Rev. Rul. 411, 1973-2 C.B. 180 (§ 501(c)(6) status denied shopping center organization where membership was compulsory, and limited only to center occupants).

63. See *Crooks v. Kansas City Hay Dealers’ Ass’n*, 37 F.2d 83, 85 (8th Cir. 1929). The national and local chambers of commerce are familiar examples of organizations serving the general business interests of a community.

64. *Retailers’ Credit Ass’n v. Commissioner*, 90 F.2d 47, 51 (9th Cir. 1937).

65. See Rev. Rul. 76-297, 1976-1 C.B. 158 (§ 501(c)(6) status granted under this rationale to organization designed to attract conventions as means of improving business throughout community).

66. See *supra* pp. 1428, 1430.

67. Exempted organizations must be those “[n]o part of the net earnings of which inures to the benefit of any private shareholder.” IRC § 501(c)(6) (1982). It should be noted here the “private inurement” requirement for § 501(c)(6) organizations is logically more permissive than that under § 501(c)(3). The (c)(6) groups are established in order to promote lines of trade which will obviously benefit the groups members in those trades. The (c)(6) members will always have a financial stake in these activities; the pivotal question seems to be whether the benefits extend beyond the individual members’ interests. Because the § 501(c)(3) organization exists to promote a public purpose rather than a line of trade, the existence of *any* financial benefits flowing back to influential members of the organization should raise private inurement questions.

of a kind ordinarily carried on for profit."⁶⁸ Beyond this, no constraints are imposed on lobbying, litigation,⁶⁹ or even participation in political campaigns.⁷⁰ In sum, given common economic interests in a line of trade or geographic area, (c)(6) groups enjoy an exempt status with the freedom to promote these interests to the hilt.

D. *The Requirements for Public Charities in Practice: The "Organizational" and "Operational" Tests*

The Code requires that public charities be "organized and operated exclusively" for their exempt purposes.⁷¹ Treasury regulations develop separate tests for "organized" and "operated." Failure to meet either one is said to defeat the exemption.⁷² These requirements take on a certain flexibility, however, in light of the Service's interpretation of the term "exclusively."⁷³ While seeming to admit of no exception, "exclusively" turns out to be a less stringent and more opaque standard.

The "organizational" test focuses on the organization's articles of incorporation or charter.⁷⁴ The statements of purpose may be as broad as those of the statute, i.e., that a group is organized for "charitable purposes."⁷⁵ Beyond these declarations, the charity must avoid authorizing activities substantially beyond the scope of its exempt purposes,⁷⁶ or activities such as political involvement or substantial lobbying which are prohibited to section 501(c)(3) organizations as a class.⁷⁷ With a final provision for the distribution of its assets upon dissolution to other exempt purposes,⁷⁸ the charter passes muster. The "organizational" test is, then, essentially a pa-

68. Treas. Reg. § 1.501(c)(6)-1, 1978-1 C.B. 159.

69. Litigation has been specifically approved as a § 501(c)(6) activity. *E.g.*, Rev. Rul. 67-175, 1967-1 C.B. 139.

70. Legislative activities for § 501(c)(6) groups are indirectly curtailed, however, by the application of § 601(e), which places limits on deductions for lobbying expenses by businesses. Two types of deductions are allowed. The first is direct lobbying of legislative bodies. I.R.C. § 162(e)(1)(A) (1982). The lobbying must be on a subject of "direct interest" to the taxpayer. *See* Treas. Reg. § 1.162-20(c)(2)(ii)(b) (1965). The second is direct communications between a trade organization and its members on pending or proposed legislation. I.R.C. § 162(e)(1)(B) (1982). No deductions are available for campaigns on legislation (or candidates or referenda) designed for the general public, i.e., "grass-roots" lobbying. *Id.* § 162(e)(2)(B). This distinction between "direct" and "grass-roots" lobbying is also made applicable to § 501(c)(3) charities which elect to comply with § 501(h). Since § 501(c)(6) organizations are primarily supported by business members, their "grass roots" lobbying activities may be limited as a practical matter by the fact that this part of their operations cannot be written off by contributors as a business deduction. No such limitation applies, however, to their litigation programs.

71. I.R.C. § 501(c)(3) (1982).

72. Treas. Reg. § 1.501(c)(3)-1(a) (1960).

73. *Id.* § 1.501(c)(3)-1(c)(1).

74. *Id.* § 1.501(c)(3)-1(b)(2).

75. *Id.* § 1.501(c)(3)-1(b)(1)(ii).

76. *Id.* § 1.501(c)(3)-1(b)(1)(i)(b).

77. *Id.* § 1.501(c)(3)-1(b)(3).

78. *Id.* § 1.501(c)(3)-1(b)(4).

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per exercise. Unless an applicant goes out of its way to flag conduct approaching subterfuge, its exemption should be assured.

The Service's "operational" test looks to the activities of public charities to ensure that they are within the charter: i.e., that they are not straying into a prohibited area of private inurement, unrelated business, politics, or substantial lobbying.⁷⁹ The test adds no new requirements; it is the enforcement mechanism for the other requirements of section 501(c)(3). Its inherent difficulty derives from the leeway necessarily afforded to charities for "insubstantial" departures from the section 501(c)(3) rules. The controlling guidance is that an organization will be viewed as operating "exclusively" for exempt purposes "if it engages *primarily* in activities which accomplish these purposes."⁸⁰ If "exclusively" means "primarily," then what does "primarily" mean?⁸¹

The answer begins with a recognition that the Code's charitable exemption provisions are to be interpreted liberally, in favor of the taxpayer, because of the unique benefits provided to the public by charitable services.⁸² A strict "all or nothing" reading of "exclusively" might defeat the purpose of the exemption. Any large-scale charitable organization functioning in a modern economy may have some aspects of a private business, such as merchandise sales or service fees, which would seem to be non-charitable. For this reason, courts will overlook (accept as "charitable") activities normally considered non-charitable if, while "substantial," they are an integral part of accomplishing the organization's exempt purposes (e.g., the sale of educational materials by an educational charity).⁸³ Courts will also overlook activities which, although unrelated, are less than substantial, "only incidental," or a "slight and comparatively unimportant deviation."⁸⁴ As a corollary to these principles, however, exemption will be denied by the "presence of a single . . . [non-exempt] purpose, if substantial in nature . . . regardless of the number or importance of truly . . . [exempt] purposes."⁸⁵

79. *Id.* § 1.501(c)(3)-1(c).

80. *Id.* (emphasis added).

81. The Service would like to answer this question, as would any agency, by reserving to itself the broadest possible discretion. Its Exempt Organizations Handbook recognizes "difficult conceptual problems" in the terms "primarily" and "insubstantial," and declares that "[q]uestions involving the application of these terms can more readily be resolved on the basis of the facts of a particular case." IRS, EXEMPT ORGANIZATIONS HANDBOOK § 332 (1983). We are led, then, to particular cases for the policies and factors controlling this determination.

82. *See, e.g., Helvering v. Bliss*, 293 U.S. 144, 150-51 (1934). This "liberal construction" approach is an exception to a general rule of strict construction of the Code.

83. *See B.S.W. Group, Inc. v. Commissioner*, 70 T.C. 352, 356 (1978).

84. *Seasongood v. Commissioner*, 227 F.2d 907 (6th Cir. 1955).

85. *St. Louis Union Trust Co. v. United States*, 374 F.2d 427, 431 (8th Cir. 1967) (quoting *Better Business v. United States*, 326 U.S. 279, 283 (1945)). The strength of this sanction—similar to the general-versus-private benefit requirements under § 501(c)(4) and § 501(c)(6)—may lie largely in the eye of the beholder. Thus, the Service's refusal to qualify a commercial parking facility under § 501(c)(3), rationalized by the applicant as improving public access to local businesses, was reversed in

The quest for certainty in the term "primarily" is not significantly aided by resort to a fixed percentage of non-charitable activity, although percentages can be an influential factor.⁸⁶ A more typical approach is that taken by the Service in revoking the Sierra Club's section 501(c)(3) exemption in 1966, following its militant (and successful) grassroots lobbying campaign against a hydro-electric power project in the Grand Canyon.⁸⁷ Without an attempt at quantification, the Service found that in retaining a Washington lobbyist and buying newspaper and magazine advertisements, these activities of the Club were "regularly carried on" and not "casual," "incidental," or "sporadic."⁸⁸

Monterey Public Parking, which found the activity "not carried on in the same manner" as a commercial lot and "carried on only because it is necessary for the attainment of an undeniably public end." *Monterey Public Parking Corp. v. United States* 321 F. Supp. 972 (N.D. Cal. 1970), *aff'd*, 481 F.2d 175 (9th Cir. 1973). *Monterey Public Parking* may represent a high-water mark in the leeway afforded to public charities under the operational test. The Service has announced that it will not follow the decision, and has since denied exemption in similar cases. Rev. Rul. 86, 1978-1 C.B. 151.

86. In *Seasongood v. Commissioner*, the court allowed exemption of a good government league which devoted less than five percent of its efforts to political action, finding the activities not "substantial." 227 F.2d at 907. This case was decided before the 1954 amendments barring political activity without qualification. A subsequent case, however, has rejected the "five percent" approach with the following explanation:

[T]he suggestion in *Seasongood* that five percent of the organization's activity must be deemed insubstantial for purposes of the statute introduces a questionable approach to the problem. The apparent certainty of a percent test obscures the basic difficulties of balancing activities in the context of organizational objectives and circumstances. For example, the amount of non-public activity arguably "substantial" may well vary between religious groups and labor organizations.

Krohn v. United States, 246 F. Supp. 341, 347-48 (D. Colo. 1965). A middle ground was offered by the Third Circuit in *Pittsburgh Press Club v. United States*, remanding the related/unrelated question to the trial court with the requirement that it balance factors comparing the totals in each category, but fixing no percentage. 536 F.2d 572, 574-76 (3d Cir. 1976). On remand, however, the District Court allowed the exemption through a finding that the unrelated business was only about two to four percent of the total, and therefore insubstantial. 426 F. Supp. 553 (W.D.Pa. 1977). Decisions such as this perpetuate the "five percent" rule-of-thumb which, official or not, still permeates tax advice on this question.

87. See Note, *The Sierra Club, Political Activity and Tax Exempt Charitable Status*, 55 GEO. L.J. 1128 (1967).

88. Letter from District Director to Sierra Club, Dec. 16, 1966, reprinted in 6 FED. TAXES (P-H) ¶ 54,664 (1966), cited in Note, *supra* note 87, at 1128 n.6. So ruling, the Service claimed to have factored out of its decision any expression on the merits of the Club's campaign. It is perhaps only a coincidence that the U.S. Postal Service subsequently revoked the Sierra Club's preferred mailing rates, see *supra* note 45, and the Internal Revenue Service has since thoroughly audited the Sierra Club's § 501(c)(3) public interest law firm, the Sierra Club Legal Defense Fund. Coincidence or no, the potential in such discretionary rulings for abuse based on the perceived ideology of the charity is strong. See, e.g., *Senate Hearings*, *supra* note 18, at 76 (comments of Senator Mondale). As Thomas C. Huston, White House Counsel in the Nixon Administration, wrote to H.R. Haldeman:

What we cannot do in a courtroom via criminal prosecutions to curtail the activities of some of these groups, IRS could do by administrative action. Moreover, valuable intelligence-type information could be turned up by IRS as a result of their field audits.

Letter from T.C. Huston to H.R. Haldeman (Sept. 21, 1970), as quoted in H. THOMPSON, *THE GREAT SHARK HUNT* 283 (1979); see London, *IRS Hassles Idaho Environmentalists*, *RESOURCES*, Spring 1983, at 14; Note, *The Revocation of Tax Exemptions and Deductions for Donations to 501(c)(3) Organizations on Statutory and Constitutional Grounds*, 30 UCLA L. REV. 156, 172-74 (1982). IRS investigations, prior to revocation, appear to be even more difficult to curtail. See High

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In the end, the search for the meaning of “primarily” ends in a zone of considerable discretion. It would seem, however, that this discretion would be at least influenced by the nature of the prohibition involved. The Code itself bars private inurement and political activity without qualification. Accepting this language at face value, it should not take much non-exempt behavior to disqualify an otherwise eligible charity on either of these grounds.⁸⁹ The prohibition on “substantial” lobbying has been largely resolved through section 501(h).⁹⁰ The question of unrelated business income remains difficult, but not relevant to those charities such as PILFs, that do not charge for services. This narrows the problem to the last, ill-defined prohibition under section 501(c)(3), when a “more than insubstantial part” of an organization’s activities “is not in furtherance of an exempt purpose.”⁹¹ For guidance here we can draw on the structure of the Code itself, which distinguishes non-profit organizations from all other profit-making concerns, and on the above discussion, to identify several influential factors:

1. The quantum of exempt activities;
2. The quantum of non-exempt activities;
3. The nexus between the non-exempt activities and the organization’s exempt purposes (the closer the nexus, the more likely the exemption);
4. The nexus between the non-exempt activities and traditional, commercial activity (the more commercial in appearance, the less likely the exemption).

These factors and their refinements will become useful in examining the activities of the business-sponsored PILFs.

Adventure Ministries, Inc. v. Commissioner 726 F.2d 555 (9th Cir. 1984) (courts lack jurisdiction under declaratory judgment provisions of the Code to review an investigation alleged to be politically motivated and without reasonable cause.)

89. The private inurement requirement will become an important one for the business-sponsored public interest law firms. The firms appear to have avoided all connections with political activity with one exception: an alliance with the College Republican National Committee to oppose Public Interest Research Groups on college campuses. A memorandum outlining purposes of the alliance explains: “[I]t will mean that the organized left will not have students’ money to lobby against President Reagan.” Memorandum of Steve Baldwin, National Projects Director, College Republican Committee, to College Republican State Chairmen (undated) (with enclosures) (on file with author). “If need be, the CNRC will assist you in undertaking legal action. We are in contact with several conservative legal foundations that are interested in fighting PIRG in court. All you need to do is provide a plaintiff.” *Id.* While this initiative does not seem to violate directly the prohibition of § 501(c)(3), the connection to a larger political strategy cannot be ignored. Asked to comment on this program, the Republican National Committee’s communications director is quoted as saying: “To the extent that they are trying to diminish the strength of groups opposed to the President, especially when those groups receive obligatory funds, that is something we generally support.” *College Republicans Open a Drive Against Public Interest Research Groups*, N.Y. Times, Mar. 13, 1983, at A28, col. 1.

90. It would seem logical for the Service to use the percentage limitations of § 501(h) as a measuring stick even for those organizations which do not elect to come under its provisions.

91. Treas. Reg. § 1.501(c)(3)-1(c)(1) (1960).

II. TOWARDS A DEFINITION OF PUBLIC INTEREST LAW

The Internal Revenue Service frequently finds itself at the leading edge of the movement of charity into new and unexplored fields.

IRS Commissioner Thrower, 1970

This is our answer to the hedonists and nihilists who say there is no other way to get justice except to dismantle everything and knock it down and then see what we can do about it.

Senator Javits, 1970⁹²

In the fall of 1970, the Internal Revenue Service came to grips with the concept of public interest law.⁹³ After a flurry of controversy, the practice was recognized as charitable under section 501(c)(3).⁹⁴ By 1976, a survey of PILFs identified almost 600 attorneys in over 90 tax-exempt organizations across the country, operating on a total budget of approximately \$40 million.⁹⁵ In 1980, 117 firms with 711 staff lawyers were reported, including those of the business PILFs.⁹⁶

If the timing and motives of the Service's sudden examination of public interest law in October 1970 were questionable,⁹⁷ its difficulty in defining

92. *Senate Hearings*, *supra* note 18, at 58 (statement of Comm'r Thrower); *id.* at 61 (statement of Sen. Javits).

93. IRS News Release No. 1069, Oct. 9, 1970, *reprinted in Senate Hearings*, *supra* note 18, at 5.

94. For contemporaneous discussion, criticism and defense of public interest law, *see, e.g.*, Cahn & Cohn, *Power to the People or the Profession? The Public Interest in Public Interest Law*, 79 *YALE L.J.* 1005, 1007 (1970) ("The current crop of public interest law firms are essentially hot-house flowers. They are the product of limited, short-term foundation largess."); Halpern & Cunningham, *Reflections on the New Public Interest Law: Theory and Practice at the Center for Law and Social Policy*, 59 *GEO. L.J.* 1095 (1971); Note, *The Practice of Law in the Public Interest* 13 *ARIZ. L. REV.* 797 (1971); Note, *The Tax-Exempt Status of Public Interest Law Firms*, 45 *S. CAL. L. REV.* 228 (1972); Riley, *The Challenge of the New Lawyer: Public Interest and Private Clients*, 38 *GEO. WASH. L. REV.* 547 (1970); Wexler, *Practicing Law for Poor People*, 79 *YALE L.J.* 1049 (1970). Discussion of the practice, hot and heavy at that time, has since abated. More recent articles focus largely on the recovery of attorney's fees and other funding problems. *See* Heineman, *In Pursuit of the Public Interest* (Book Review), 84 *YALE L.J.* 182 (1974) (discussing difficulties of financing public interest law).

95. COUNCIL FOR PUBLIC INTEREST LAW, *BALANCING THE SCALES OF JUSTICE* 2, 5 (1976). The same study reported, by way of contrast, approximately 400,000 attorneys in practice in the United States. *Id.* at 165. Although dated, this is the most comprehensive report available on public interest law practice; the Council prepared an update on selected aspects of the practice in 1980, entitled *Survey of Public Interest Law Centers*. As the Council was established to address problems of funding public interest practice, its analysis did not include the government-funded legal aid societies and legal services programs, or those lawyers who serve the public on a pro bono basis ancillary to and funded by their commercial practice. *Id.* at 3, 7. The interest of the Internal Revenue Service also focuses on the funding of PILFs—as income and as deductions by private donors. The Service's guidelines and rulings for public interest law, therefore, address approximately the same universe of organizations which was included by the Council in its report.

96. SURVEY OF PUBLIC INTEREST LAW CENTERS, *supra* note 95, at 2.

97. The Service's motives in questioning the charity of public interest litigation were widely suspected of being political. *E.g.*, *IRS to the Rescue*, *N.Y. Times*, Oct. 15, 1970, at 40, col. 2 (editorial) ("Now the I.R.S. is extending its intimidation and harassment to a much wider range of organizations."); *Tax-Exempt Litigation: IRS Curbs Draw Widespread Opposition*, *SCIENCE*, No. 13, 1970, at 716 ("[O]pponents of the IRS action see the investigation as an attempt by the Nixon Administra-

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the area was genuine. The concept of “public interest” practice seemed at first every bit as elusive as that of “charity,” with less precedent to be found in history and law. The Service had long recognized law practice on behalf of certain disadvantaged minorities—in areas of poverty, racial discrimination, and civil liberties—as charitable. The question became whether and in what way it would recognize a broader spectrum of advocates for environmental protection, consumer rights, and other interests of the general public. The Service’s answer to the question would determine its treatment of and requirements for the exemption of public interest law firms under section 501(c)(3). To understand the answer, we must begin with the development of this form of practice, and the Service’s response to it fourteen years ago.

A. *The Roots of Public Interest Law.*

The concept of providing disadvantaged people with legal representation—as opposed to hot meals, hospital care, and a variety of other charitable services—arose in this country at least as early as 1876, when the German Society of New York established a legal aid office in New York City to assist newly arrived immigrants.⁹⁸ By 1917, forty-one cities had established legal aid programs for the poor, and the numbers have risen and fallen since then with the revenue available from local governments, community drives, and the private bar. In the early 1960’s, the Federal Office of Economic Opportunity began funding independent legal services; the funding grew to over \$71 million in the next five years, and in 1974, Congress created the independent Legal Services Corporation.⁹⁹ The orig-

tion to curtail lawsuits that protect the environment or the consumer at the expense of private business.”). The remarks of Senator Mondale at the subsequent Senate hearings on this issue illustrate the same suspicions:

From the beginning, I have viewed these attacks on the legal services program and public interest law firms as part of the same pattern, a desire by some members of this administration to deny legal redress for the grievances of the poor and those plagued by consumer abuses and a deteriorating environment . . . I could not help question and wonder why the IRS singled out public interest law firms—those trying to protect the poor and those trying to protect the environment from polluters—for a special study; . . . At the same time, IRS apparently is not carrying on any studies about whether we should deny to commercial firms the right to deduct their costs in polluting as ordinary and necessary business expenses.” . . . Who wanted this proposed regulation? What sources came to you and urged that the law firms protecting the public interest be denied tax exemption? . . . What sources for example set such a regulation in motion? How is that done? Who does it?

Senate Hearings, supra note 18, at 74–77.

98. This synopsis of the legal aid programs is drawn largely from Rabin, *Lawyers for Social Change: Perspectives on Public Interest Law*, 28 STAN. L. REV. 207, 207–31 (1976), which provides particularly detailed references for the early history of the ACLU and NAACP, and from COUNCIL FOR PUBLIC INTEREST LAW, *supra* note 95, at 21–57.

99. The Legal Services Corporation Act, 42 U.S.C. § 2996 (1976). The future of the Legal Services Corporation, rosy at the time of the Council’s report (“a firmly institutionalized part of the universe of public interest law,” COUNCIL FOR PUBLIC INTEREST LAW, *supra* note 95, at 51), has become cloudy in recent years. Program funding has been reduced, and some of the Corporation’s most outspoken critics have been appointed to its Board of Directors. See *An Organization at War*

inal legal aid programs dealt with arbitrary landlords, impounded property, and the day-to-day problems of the poor, as they walked in the door, in the after-the-injury manner of a traditional law practice. The legal services programs, representing these same poverty-level clients, began to draw some conclusions about the causes of these problems from their recurring problems and began to seek larger remedies: They not only asked for the apartment back, they wanted to change the rules for eviction. In arriving at this law reform approach, which came to be known as "impact litigation," they were not alone.

A second root of public interest practice grew from the American Civil Liberties Union (ACLU), created in 1916 as the American Union Against Militarism to protect the rights of pacifists when much of America was calling for war. Led from this beginning into the defense of labor organizers and deportees, the organization broadened its name and scope to include the rights of agnostics, Nazis, and an almost unlimited spectrum of political and social minorities. With this growth came a change in style. A handful of prestigious, volunteer attorneys in the early years, filing selective briefs of *amicus curiae*, became by 1974 an organization of 275,000 members with 34 full-time lawyers in local offices and another 18 staff attorneys at national headquarters. These numbers were multiplied through volunteer counsel in every state, enlisted for specific cases on a low-fee and even no-fee basis. With this growth came a shift in tactics, from *amicus* to direct representation, and to the offense. Of the eighteen attorneys at ACLU headquarters in 1974, fourteen were addressing not the problems of individual clients but rather, in more general actions, the rights of juveniles, treatment of prisoners, and military justice. The ACLU was catching the same "impact litigation" breeze.

The National Association for the Advancement of Colored People (NAACP), founded in 1909, entered litigation on behalf of black Americans as early as 1914 and has been involved in suits against individual acts of discrimination ever since. In 1930, however, having received a major foundation grant, the NAACP launched a long-term litigation strategy to eliminate discrimination in housing, education, and employment. Its 1934 Annual Report described the strategy as follows: "It should be made clear that the campaign is a carefully planned one to secure decisions,

With Itself: Legal Services Rifles its Files and Ruffles Some Feathers, TIME, Oct. 3, 1983, at 83. Indeed, the Reagan Administration's first candidate for President of the Legal Services Board was Ronald Zumbun, the President of the Pacific Legal Foundation. The legal aid model has had to deal not only with the hand-to-mouth proceeds of annual community fund drives, but also the local political pressures which come from that same community. See COUNCIL FOR PUBLIC INTEREST LAW, *supra* note 95, at 23-25. Legal Services has faced the same problems with annual appropriations and political reaction at the national level. See, e.g., Heineman, *supra* note 94, at 189 ("The problem with using public subsidies, through government programs, to support independent public interest law is, of course, expressed in a single word: politics."), Comment, *The Legal Services Corporation: Curtailing Political Interference*, 81 YALE L.J. 231 (1971).

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rulings, and public opinion on the broad principle instead of being devoted to merely miscellaneous cases.” In 1939, this campaign was assumed by the newly-created NAACP Legal Defense and Educational Fund (NAACP/LDF) which ran a string of successes through *Brown v. Board of Education* in 1954. By 1975, NAACP/LDF maintained a staff of twenty-five attorneys and a network of volunteer cooperating lawyers in every state. The caseload was enormous, and bottomed heavily on the defense of individuals as demonstrators, draft resisters, freedom riders, and a dozen similar postures, defending the accused. Concurrently, however, the NAACP/LDF was mounting initiatives to eliminate the death penalty, de facto segregation, voting inequalities, and discrimination in the real estate market. It, too, was in the business of law reform.

These three large movements in poverty, civil liberties, and civil rights practice changed more than the law of their respective fields. As they evolved, particularly into the 1960's, these organizations changed the way lawyers approached the law. Their lawyers had clients and the clients were injured, but so also was a larger sense of justice which is as difficult to define precisely as it would be to deny. Most importantly, they did not simply seek compensation for their clients; increasingly they sought to change the law.

There are no “three sources” of anything, neither the Fall of the Roman Empire nor the rise of public interest law.¹⁰⁰ The strategy and success of these three organizations were propelled by other movements of the times, each contributing to the character of public interest law. Prominent among them was the attitude of the organized bar. As recently as 1951, the President of the American Bar Association was writing that the greatest threat to America, apart from Communism, was “the propaganda campaign for a federal subsidy to finance a nation-wide plan for legal aid and low-cost legal service.”¹⁰¹ Within the next twenty years, the Bar had come to full support not only of federal assistance to legal aid programs, but also to Bar involvement in a far broader range of unrepresented or underrepresented interests.¹⁰² The Lawyer's Committee for Civil Rights

100. A considerable part of education is spent, at least in this author's experience, learning the “three causes” of historical events.

101. Storey, *The Legal Profession Versus Regimentation: A Program to Counter Socialization*, 37 A.B.A. J. 100, 101 (1951).

102. An ABA President subsequently wrote:

While activity on behalf of the indigent is laudable and must continue, it is now apparent that this concern is only one part of the total obligation of the legal profession to ensure that each and every segment of society is adequately represented There are both individuals and groups who, for practical purposes, are barred from the courts and from legal process generally because they lack sufficient commitment and resources to support litigation on the same scale as their adversaries. Environmental and consumer concerns are two immediate and obvious examples.

Smith, *President's Page*, 60 A.B.A. J. 641 (1974).

Under Law was formed,¹⁰³ and sent hundreds of lawyers into the South to come up against "the system" and to come away dedicated to changing the system through the use of law.

At the same time, thousands of middle-class urban residents, solid citizens who led lives no closer to protest than the headlines of their evening newspapers, were suddenly confronting intractable government programs like the federal Interstate Highway System and the destruction, as they saw it, of downtown Chicago, Boston, Baltimore, New York, Atlanta, San Francisco, San Antonio, New Orleans, Nashville, Memphis, Washington . . . and were taking their cases to court.¹⁰⁴ Moreover, for the first time, under the impetus of the Administrative Procedure Act,¹⁰⁵ the courts were overcoming their traditional difficulties with sovereign immunity, standing, law to apply, ripeness, mootness and private rights of action . . . and listening. The United States Court of Appeals for the District of Columbia Circuit in *Office of Communication of United Church of Christ v. Federal Communications Commission* opened FCC proceedings to public intervention.¹⁰⁶ The Second Circuit in *Scenic Hudson Preservation Conference v. Federal Power Commission* opened access to the FPC, and when that failed, to the courts.¹⁰⁷ The United States Supreme Court was finding that such litigation was indispensable to the exercise of First Amendment rights,¹⁰⁸ and was viewing the denial of tax exemption to citizen groups as an action with First Amendment limitations.¹⁰⁹ Scientist Rachel Carson published *Silent Spring*.¹¹⁰ Consumer advocate Ralph Nader published *Unsafe at any Speed*.¹¹¹ Americans read them. Foundations

103. See 10 Year Report of the Lawyer's Committee for Civil Rights Under Law (1973), cited in COUNCIL FOR PUBLIC INTEREST LAW, *supra* note 95, at 75 n.64.

104. See, e.g., *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402 (1971); *DC Federation of Civil Ass'ns v. Volpe*, 459 F.2d 1231 (D.C. Cir. 1971), cert. denied, 405 U.S. 1030 (1972); *Nashville I-40 Steering Committee v. Ellington*, 387 F.2d 179 (6th Cir. 1967); *Road Review League v. Boyd*, 270 F. Supp. 650 (S.D.N.Y. 1967); R. BAUMBACH & W. BORAH, *THE SECOND BATTLE OF NEW ORLEANS: A HISTORY OF THE VIEUX CARRE RIVERFRONT EXPRESS CONTROVERSY* (1981). Many of these highway controversies arose and first landed in the courts prior to the National Environmental Policy Act of 1970, 42 U.S.C. § 4321 (1976) and the Internal Revenue Service's consideration of public interest law in 1970. See R. LIOFF, *A NATIONAL POLICY FOR THE ENVIRONMENT, NEPA AND ITS AFFIRMATION*, 33-35 (1976).

105. 5 U.S.C. § 701-06 (1982).

106. 359 F.2d 994 (D.C. Cir. 1966).

107. 354 F.2d 608 (2d Cir. 1965), cert. denied, 384 U.S. 941 (1966). The court dismissed the FPC's argument that citizens groups lacked standing because of insufficient economic interest in the controversy, and went on to state that "the right of the public must receive active and affirmative protection at the hands of the Commission." *Id.* at 620.

108. E.g., *United Mine Workers v. Illinois State Bar Ass'n*, 389 U.S. 217 (1967); *Brotherhood of R.R. Trainmen v. Virginia State Bar*, 377 U.S. 1 (1964); *NAACP v. Button*, 371 U.S. 415 (1963).

109. See *Speiser v. Randall*, 357 U.S. 513, 519 (1958) (denial of tax exemption for engaging in certain speech necessarily will have effect of coercing claimants to refrain from the proscribed speech); *accord*, *Sherbert v. Verner*, 374 U.S. 398 (1963).

110. R. CARSON, *SILENT SPRING* (1962). Originally published in the *New Yorker* magazine, this book is generally credited with bringing the problems of pesticide pollution to the attention of the American public, and with it a concern for environmental protection.

111. R. NADER, *UNSAFE AT ANY SPEED* (1966). This book and the attendant publicity became

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read them, and increased their funding not only for the ACLU and NAACP's law programs but for new ones directed to consumer protection and the environment.¹¹² The Environmental Defense Fund was formed in 1968. The Center for Law and Social Policy, a catalyst for public interest law in Washington, D.C., began in 1969.

The idea of using law in a less reactive way was spreading to even the most conservative corners of the profession. Federal prosecutors, who had historically viewed their role as handling cases which law enforcement officers brought in the door, were now creating strike forces on organized crime, targeting major criminals and bringing whatever charge could stick.¹¹³ They, too, were using law more affirmatively for a social end.

For those members of the profession who opposed these developments, there was a visible alternative in the streets, in the riots following the murder of Martin Luther King and those continuing over the Vietnam War, predicated on a growing feeling, justified or not, that "the system" did not work and that there was no justice for the blacks, or the poor, or the young.¹¹⁴

B. *The Internal Revenue Service Response to Public Interest Law: The 1970 Guidelines*

*If one may resort to Biblical imagery, the public interest law firms represent a small but dangerous David going forth to do battle against a huge, powerful armored Goliath. The Internal Revenue Service is like a referee who rushes in to check the weapons. While Goliath hefts his sword and spear and battle-axe unhindered, the referee threatens to disqualify David for putting too-large pebbles in his sling!*¹¹⁵

Legal services programs, the NAACP, the ACLU and a rising tide of legal activism were all influences behind the applications that arrived at the Internal Revenue Service in 1969 and 1970 seeking qualification as public interest law firms.¹¹⁶ For the Service, the range of these firms was intimidating, as then-Commissioner Thrower described:

moving forces for consumer protection.

112. The Law-Reform programs of the ACLU and the NAACP/LDF and the newer programs of the Environmental Defense Fund and the Center for Law and Social Policy were created and originally supported through foundation grants. Rabin, *supra* note 98, at 210-29.

113. Department of Justice strike forces were established in 1962. Gen'l Orders 672-76 (1962).

114. See *The IRS and the Public Interest*, Wash. Post, Nov. 14, 1970, at A16, col. 1. ("The nation—including even the corporations and government agencies which are sued—should be glad there are so many young professionals who would rather do battle in the courts rather [sic] than in the streets.")

115. *Senate Hearings*, *supra* note 18, at 263 (statement of the National Council of Churches of Christ).

116. *Id.* at 15, 28 (press conference of IRS Commissioner R. Thrower, Nov. 12, 1970).

They include organizations opposed to specific industrial undertakings which may adversely affect the environment as well as organizations which propose to litigate any matter which affects the environment. They include organizations which will litigate on behalf of consumers generally to protect consumers' interests and organizations which will litigate on any matter they conceive to be in the public interest.¹¹⁷

The Service stalled, granted several applications out of hand, and rejected others.¹¹⁸ The extent of its confusion is reflected in a ruling issued to one applicant for litigation in the environmental field which recognized the law firm as charitable but then required it to submit any proposal for litigation to the Treasury Department for prior approval.¹¹⁹

Finally, on October 9, 1970, the Service tried to bar the door with a press release announcing that it had "temporarily suspended the issuance of rulings for public interest law firms" which litigate "for what they determine to be the public good in some chosen area of national interest."¹²⁰ Excluded from the suspension were "the familiar legal aid groups which provide representation for specifically identified groups, such as poor or underprivileged people that are traditionally recognized as objects of charity." As for donations to public interest law firms, the Service was "in no position at this stage to make any judgment about the deductibility of contributions . . . to currently tax exempt firms of the type being studied."

With this press release, tax exemptions for public interest law practice were placed in jeopardy. Funding sources even for firms which had already received exemptions were threatened.¹²¹ Although the Service's release expressed "concern about the lack of standards" for these new firms, it offered no indication of the problems it saw as controlling or its thinking on how to address them.¹²² Whatever the Service's intentions, it is not

117. *Id.* at 15, 16.

118. *Id.* at 28.

119. *Id.* at 93 (statement of Mortimer Caplin, former Commissioner of Internal Revenue Service, concerning the application of Natural Resources Defense Council).

120. IRS News Release No. 1069, *supra* note 93. The Service "expected to announce" its new position within 60 days. *Id.* Given the potential for delays in such an inquiry and the informal nature of the commitment—an expectation, communicated by a press release—few at the time could have placed confidence in an early decision.

121. The Service muddied the water six days later with a second press release which announced that while foundations and other donors to PILFs that had already received exemption rulings would be "fully protected," the IRS hoped that "major commitments for long-range funding for such organizations would not be undertaken." IRS News Release IR 1072, Oct. 15, 1970 *reprinted in Senate Hearings, supra* note 18, at 7.

122. The absence of identified problem areas put the commenting Senators and law firms at a serious disadvantage. *See Senate Hearings, supra* note 18, at 144-45 (memorandum from Arnold & Porter to the Senate Subcommittee) ("the exact nature of the Service's expressed concern regarding so-called public interest litigation conducted or supported by charitable organizations has not been specifically delineated"). In their absence, commentators looked to contemporaneous speeches and writings,

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surprising that proponents of public interest law saw them and reacted to them as hostile.

The roof fell in. Within four days, the Senate Committee on Labor and Public Welfare and its Subcommittee on Employment, Manpower and Poverty had written the Service in protest, scheduled oversight hearings, and asked the Commissioner to attend.¹²³ The Commissioner requested a delay. The Senators insisted. The Commissioner again requested a delay. The Senate again insisted. Senator Sam Ervin, chairman of the Senate Committee on the Judiciary's Committee on Constitutional Rights, propounded questions to the Service challenging both the substance of its proposal and its procedure.¹²⁴ Senators issued angry press releases.¹²⁵ The national press printed them; editorials and opinion pieces critical of the Service appeared in dozens of metropolitan newspapers, most frequently in the *Washington Post* and *New York Times*.¹²⁶ Letters from the public to editors, to the Senate Subcommittee, and to the Service were more critical still.¹²⁷ Nineteen former federal cabinet members and agency heads signed a joint letter urging the Service to resume its qualification of public interest firms.¹²⁸ Law schools, in a rare sortie from academia, voiced their criticisms to the Senate and the IRS.¹²⁹ Several of Washington's most prestigious law firms—Arnold and Porter, Caplin and Drysdale, and Wilmer, Cutler and Pickering among them—which exchanged personnel regularly with the Service and did business with it on a daily basis for commercial clients, weighed in outspokenly on the side of public interest law.¹³⁰

By the time of the scheduled hearings, five weeks after the October 9th

in addition doubtless to their own contacts within the IRS, in an attempt to read the Service's mind. *Id.* at 168-71.

123. For the several exchanges between the Subcommittee and the Commissioner, see *Senate Hearings*, *supra* note 18, at 36-45.

124. Letter of Sen. Sam J. Ervin, Jr., to the Hon. Randolph W. Thorer (Oct. 29, 1970), reprinted in *Senate Hearings*, *supra* note 18, at 47. The Service's process—in essence, rulemaking by press release—came under heavy fire at the subsequent hearings:

Mr. Chairman, the Revenue Service has in the past conducted studies. The practice had been to quietly bring in the affected industry groups. . . . If industry were involved, rather than charitable organizations, one might assume that the industry representatives would have been quietly called into Washington, and all the information necessary for Revenue to rule—one way or the other—would have then been obtained. A good example of such an industry type study took place a few years back when the tax treatment of treble damage payments was under study by IRS. But that type approach did not take place in this instance.

Id. at 136 (testimony of Mitchell Rogovin, counsel to the Center for Law & Social Policy).

125. *Id.* at 445-56.

126. *Id.* at 405-44.

127. *Id.* at 489-516. See *id.* at 513 (Letter of Robert P. Cort to Sen. Nelson, Nov. 5, 1970) ("Of course the commercial lobbyists are tickled pink to have a gag placed on such public-spirited organizations as the Sierra Club . . .").

128. *Id.* at 496-97 (letter to David Kennedy, Secretary of the Treasury, Nov. 11, 1970) (signed by nineteen former Chairmen and Secretaries of SEC, FPC, DOD, FCC, FTC, DOT, and EEOC).

129. *Id.* at 477-489.

130. Mortimer M. Caplin, of Caplin & Drysdale, and Sheldon S. Cohen, of Cohen and Uretz, for example, were both former Commissioners of the Internal Revenue Service. Each submitted detailed memoranda to the IRS and testified personally at the Subcommittee hearings. *Id.* at 107, 90.

release, Commissioner Thrower had agreed to testify, as had thirty-six other witnesses opposed to the suspension of the IRS exemption rulings, ranging from the national Council of Churches of Christ and the Union of American Hebrew Congregations to the United Automobile Workers and a panel of former presidents of the American Bar Association.¹³¹ In a press release of November 12, 1970, however, four days before the hearings were scheduled to begin, the Service announced that it has "completed its study" and would resume issuing rulings to public interest law firms under a newly developed set of guidelines.¹³² For the PILFs, the crisis was over. The record of the ensuing hearings, however, provides the only legislative history for the Service's initial guidelines, which have become its baseline for the treatment of PILFs as charitable organizations.

If it is easy to appreciate the reaction of that impressive chorus which rose in support of public interest law, the Service's initial problem (if not its approach) is also understandable. It saw itself on new and unmapped ground.¹³³ The traditional practice in this field had been conducted by established charities, the NAACP and ACLU, or legal aid societies with purposes and beneficiaries long recognized as charitable—unpopular or disenfranchised minorities. As the Service saw it, these groups were not exempt by virtue of the fact that they litigated but rather by the nature of their charitable interests themselves.¹³⁴ The newer organizations were being established in order to litigate, and for clients not restricted to recognized minorities. In fact, they often intended to deal with the interests of "diffuse majorities,"¹³⁵ the popular movements for environmental and

131. *Id.* at iii-iv.

132. *Id.* at 9 (IRS News Release IR-1078 (Nov. 12, 1970)).

133. "As we indicated we were faced with a relatively new phenomenon Because this presented new, serious and unresolved legal questions with little or no judicial precedence, we invited the presentation of views" *Id.* at 15 (transcript of press conference of Richard Thrower, IRS Commissioner (Nov. 12, 1970)). The PILF question "involves new areas raising new questions and there rests somewhere the responsibility of determining to what extent these efforts meet the tests of being charitable." *Id.* (statement of Richard Thrower, IRS Commissioner).

134. "The IRS has never questioned the status of these traditional charitable organizations. There has never been any doubt that the typical legal aid or civil rights organizations qualified as charitable." *Id.* at 54-55. Similarly, the Commissioner attempted to exclude "many organizations, such as conservation groups, which were held exempt because they engaged in educational activities, and as an incident to those activities, engaged in litigation in furtherance of their charitable purpose. The IRS never questioned the charitable status of these organizations." *Id.* at 55. On the basis of these statements and the subsequent Revenue Rulings which implement them, some of the major litigating public interest organizations—including the NAACP/LDF, ACLU, and National Wildlife Federation—have never applied for exemption as public interest law firms but rely instead on their recognition as educational charities under § 501(c)(3).

135. This phrase is adopted from a book review by Benjamin Heineman which perceives the essential problem of public interest law as its funding, and upbraids Simon Lazarus', *The Genteel Populists* for the failure to address it more comprehensively. Heineman, *In Pursuit of the Public Interest*, (Book Review) 84 YALE L.J. 182 (1974). Heineman's well-taken criticism notwithstanding, *The Genteel Populists* is a substantial history of the rising public interest movement in America; it also is a strong argument in its defense. See S. LAZARUS, *THE GENTEEL POPULISTS* (1974).

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consumer protection most prominent among them.¹³⁶ Was the defense of these newer interests in the public interest? Were they also “charitable”?

The IRS also gave indications of concern about the internal control of the newer firms.¹³⁷ Who was making their decisions on what was the public interest? What accountability did they have to their organizations, to the general public, indeed to anyone? The Service was concerned as well about potential abuses. Was a program of litigation itself a “charitable activity”? Was not such litigation “coercive”? Did it not penalize non-exempt law practices, and place them at a competitive disadvantage to firms subsidized by tax exemption?

The Service’s difficulty in raising these questions and in relying on them as a basis for denying exemptions was that, as pointed out in the statements of Senate members and the several commenting Washington law firms, the Service had long-accepted answers to some of them and long-accepted means of answering the rest. Through charitable exemptions to a number of non-litigating organizations—environmental and consumer organizations among them—it had already recognized at least some “diffuse majority” interests as charitable. At this point, to “unring the bell” and return the scope of charities to a narrow class of minorities—assuming such a distinction could be drawn¹³⁸—would be an even more drastic and unpopular proposal than the one it was now making. Further, the Service had never undertaken to control decisionmaking of charitable organizations internally. Its control was exercised through its “operational test”—what the organization actually undertook to do. As for the “coercive” effect of litigation, this was a form of coercion fundamental to the Constitution of the United States, long recognized by the IRS as proper when conducted by the ACLU and the NAACP/LDF,¹³⁹ among others, and recently emphasized by courts as critical to effective public participation.¹⁴⁰ Undue “harassment” through litigation, were it to take

136. Environmental litigation was a major purpose of the new public interest law firms, and at the heart of the Service’s concerns. “[M]ost of the presentations that were made to use were with respect to the environment,” *Senate Hearings, supra* note 18, at 14, 17 (press conference of Richard Thrower, IRS Commissioner (Nov. 12, 1970)). It was also an important concern of Senators Javits, Nelson, Mondale, and Yarborough. *Id.* at 53, 70–71, 76, 81.

137. This and the following concerns of the Service, never stated explicitly at the time, are taken from the comments of the Washington law firms. *See supra* p. 1446; *Senate Hearings, supra* note 18, at 62, 107.

138. How for example, would the majority and minority interest be defined? Less than fifty percent? Of whom? Civil rights may be popular nationally; would that make civil rights litigation a majority interest? Are Latin-Americans a minority in Miami? Are American women a minority? American poor, in Appalachia? Environmental protection may be unpopular in Casper, Wyoming; would an environmental lawsuit there be “charitable”? With the concept of “indigency,” agencies can at least measure income against an objective, if arbitrary, standard. With the concept of “minorities,” the standard shifts with the populations chosen, the definition of the class, and the definition of the issue in the first place.

139. NAACP/LDF had, by this time, been recognized for thirty years as a separate charity established to undertake litigation.

140. *See supra* p. 1439, *see also* *NAACP v. Button*, 371 U.S. 415, 430 (1963) (“litigation may

place, could be dealt with in audits under the Service's operational test, as could the threat of private inurement. Finally, with respect to the perceived "competitive disadvantage" problem, it was inescapable that government participation in this type of litigation was fully funded by the taxpayer, and the participation of business interests was written off as a business expense.¹⁴¹ Indeed, in a consumer or environmental lawsuit, the public interest in consumer or environmental protection was usually the only interest *not* subsidized. The exemptions did not unbalance the scales of justice; they were a partial means of balancing them.

Given the logic of this response, the Service was going to be compelled to recognize the public interest law practice. In retrospect, it seems to have had at least two options. The first, which was apparently the way it entered the proceedings, would have been to limit PILFs to a practice which was for otherwise "charitable" purposes.¹⁴² This approach would probably have admitted organizations such as the Natural Resources Defense Council (whose application was hanging in the balance) with such circumscribed goals as environmental protection. It would have been more difficult to apply to an organization such as the Center for Law and Social Policy, which directed an assortment of law reform projects and which was not limited by charter to any particular one. Indeed, were the concept of "charitable purposes" reducible to a definitive list of acceptable goals, then this approach would have made sense. In fact, however, the Service had no such list, nor could one be drawn. Its initial approach to exempting public interest law firms as charities could not succeed.¹⁴³

The Service's second option then, and the one it chose, was to focus not on the goals of a public interest law firm but on the practice of litigation itself. As the Commissioner explained:

Under these guidelines an applicant can receive from the Service recognition of its charitable status not primarily because of the merit of designated social goals which it may seek to achieve through litigation but, rather, because in this way legal representation will be made available where it has been determined that there is a public,

well be the sole practicable avenue open to a minority to petition for redress of grievances.").

141. I.R.C. § 162(a) (1982). American corporations write off an estimated \$3.7 billion annually in this fashion. See *Business Taxes: Public Interest Groups Call for Abolition of Litigation Deductions*, TAX'N & ACCTG. (BNA) G-5 (Oct. 14, 1982).

142. As the IRS Commissioner subsequently explained, "I think we were somewhat diverted initially by looking at causes but we did conclude that we could not pick and choose between causes and say litigation on behalf of this cause is good but litigation on behalf of that cause is bad." *Senate Hearings*, *supra* note 18, at 18 (press conference of Richard Thrower, I.R.S. Commissioner (Nov. 12, 1970)).

143. The Service admitted as much at the time, indicating that its guidelines for PILFs were an interim measure until it could revise its regulations for charitable organizations. *Id.* at 66, 73-74. Regulations defining more precisely what is "charitable" and what is not for purposes of § 501(c)(3) have not since been proposed. Given the difficulties such regulations would present, none seem likely.

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rather than a private interest to be served through litigation . . . *it is the availability of this type of representation that is being deemed charitable rather than the particular cause being serviced, provided, of course, that the cause is wholly a public one, not tainted by any substantial private interest . . .*¹⁴⁴

To restate the rationale: Public interest law provides *access* for unrepresented issues to the judicial system.¹⁴⁵ This statement has become the primary justification for public interest law practice, and in large part its definition. The Service's guidelines, issued as the culmination of its inquiry, addressed the operation of a firm which would provide this kind of access.¹⁴⁶ Two provisions required "representation of a broad public interest rather than a private interest," and direction of the PILF by a "board or committee representative of the public interest."

At the same time the Service issued its decision, the Commissioner held a press conference which quickly narrowed to these two features of the guidelines. The Commissioner explained that the purpose of the "independent board" requirement was to involve "a board or committee of independent citizens representative of the community which is responsible for the policies and programs of the organization."¹⁴⁷ While the selection

144. *Id.* at 66-67 (testimony of Richard Thrower, IRS Commissioner) (emphasis added).

145. The Service's rationale is fully consistent with that of the members of Washington law firms who commented during its "study" of the PILF question. *See, e.g. id.*, at 63 (letter of Louis Oberdorfer, Wilmer, Cutler & Pickering (Nov. 3, 1970)):

The service of the public interest is not the particular position advocated by the public interest law firm. The service to the public interest is the provision of an opportunity which would not otherwise exist for the duly constituted public authorities finally to identify and vindicate the public interest.

Id. (emphasis added).

146. The guidelines provided, in pertinent provisions:

.01. The engagement of the organization in litigation can reasonably be said to be in representation of a broad public interest rather than a private interest. The litigation is designed to present a position on behalf of the public at large on matters of public interest. Typical of such litigation may be class actions in the public interest, suits for injunction against action by government or private interests broadly affecting the public, similar representation before administrative boards and agencies, test suits where the private interest is small, and the like. The activity would not normally extend to direct representation of litigants in actions between private persons where their financial interests at stake would warrant representation from private legal sources. In such cases, however, the organization may serve in the nature of a friend of the court.05. The policies and programs of the organization are the responsibility of a board or committee representative of the public interest, which is not controlled by employees or persons who litigate on behalf of the organization nor by any organization that is not itself an organization described in Section 501(c)(3) of the Internal Revenue Code.07. There is no arrangement to provide, directly or indirectly, a deduction for the cost of litigation which is for the private benefit of the donor.08. The organization must otherwise comply with the provisions of § 501(c)(3) of the Code, that is, it may not participate in, or intervene in, any political campaign on behalf of any candidate for public office, no part of its net earnings may inure to the benefit of any private shareholder or individual, and no substantial part of its activities may consist of "carrying on propaganda, or otherwise attempting, to influence legislation."

Rev. Proc. 71-39, 1971-2 C.B. 575, 576.

147. *Senate Hearings, supra* note 18, at 19 (press conference of I.R.S. Commissioner Thrower

of the Board would be up to the organization, its existence would help ensure that the firm "is not a satellite or a captive of a group" not recognized under section 501(c)(3).¹⁴⁸ One question at the conference pointed out that "it would not be unusual for such groups to be the front for corporations, sometimes inspired by them."¹⁴⁹ The Commissioner responded: "If the applicant is a captive of or controlled by another non-exempt organization, it would not qualify."¹⁵⁰

Beyond the question of outside "control," the primary distinction was the public rather than the private nature of the litigation itself. *All* litigation could be characterized as in the "public interest." There was considerable "private litigation with substantial financial interest on both sides in which the public has a great interest" in the outcome.¹⁵¹ The Service was here recognizing that "there are many instances where the private interest is not such that there can be represented through normal commercial sources a public voice."¹⁵² "This is what we are talking about," the Commissioner went on to explain; "the representation of a public voice that has no substantial private interest."¹⁵³

The questions pursued this distinction. What differentiated "public" from "private"? The Commissioner replied that if, for example, the circumstances of parties affected by river pollution "normally warranted employment of counsel in commercial circles, we would think that would be the appropriate outlet."¹⁵⁴ On the other hand, "if you are dealing with something that affects people so widely that no single or small group of financial interest predominate[s], then I think you have another situation."¹⁵⁵ Suppose a corporation construed that "the building of a plant for example" was in the public interest? The Commissioner replied, "*we would recognize it as private.*"¹⁵⁶ In sum, the Service was looking not at the merits of the viewpoint but rather—consistent with its rationale of access to the judicial process—at the *ability to pay for it*.

The Commissioner and the guidelines did leave one opening in the "private/public" test. Recognizing that lawsuits between purely private interests could raise a public interest as well, the guidelines allowed entry of a PILF in these cases, "in the nature of a friend of the court."¹⁵⁷ These *amicus* appearances, however, would also have to reflect a separate, public

(Nov. 12, 1970)).

148. *Id.*

149. *Id.* at 28.

150. *Id.* at 28–29.

151. *Id.* at 19.

152. *Id.* at 25.

153. *Id.* at 25–26.

154. *Id.* at 31.

155. *Id.* at 32.

156. *Id.*

157. *Id.* at 26.

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interest. As the Commissioner explained, in a case involving “big corporate interests,” “governments at several levels,” and “other interests who may be financially interested,” all presenting positions to the court, “it would be appropriate to have a public voice that was from the public sector that does not spring from a financial interest, but concerns about the public large.”¹⁵⁸

The Commissioner’s testimony four days later before the Senate Subcommittee repeated these themes:

[I]t is a rare litigant who does not feel that there is a great public interest involved in his particular case. Thus it is not enough to say that the bringing of an action in court is ‘exclusively charitable’ merely because there is a public interest in the outcome.¹⁵⁹

More was required to qualify. The Commissioner again stressed the controlling distinction he saw in the Service’s adopted guidelines for public interest law: “I think that is the basis, the availability of the representation, rather than evaluation of the cause that we have recognized here.”¹⁶⁰

From this history, it is clear that from the time the Service formed its position on public interest law firms, their essential requirement was that the issue not be available for representation in the lawyers’ marketplace. It was not an incidental requirement. This was their definition and their bottom line.

It is equally clear that such a requirement could not be applied prospectively, as when the Service is looking at a corporate charter under its “organizational test.” It is a definition that would only work in retrospect, by seeing what interests these firms actually represented.

C. *Subsequent IRS Guidance on the Public Interest Law: Is There “Law to Apply”?*

Following the excitement of 1970, the Service issued its guidelines as a formal revenue procedure,¹⁶¹ and there matters rested for several years.

158. *Id.* at 27.

159. *Id.* (statement of Richard Throer IRS Commissioner).

160. *Id.* at 82.

161. Rev. Proc. 71-39, 1971-2 C.B. 575. Revenue rulings and procedures provide both the most relevant and the least reliable guidance on the federal tax requirements for public interest law. The most relevant, because it is only at this level that the Service has applied the Code to the practice; they constitute the only law in view. Unreliable nonetheless, because the Service does not acknowledge in them the force of law. A revenue ruling is the Service’s conclusion based on a particular set of facts. Although the rulings are published in order to “promote uniform application of the tax laws” for IRS personnel and taxpayer alike, the Service cautions against concluding that rulings are applicable in other cases unless the facts are “substantially the same”. Rev. Rul. 72-1, 1972-1 C.B. 693, 694-95. Revenue procedures enjoy a slightly elevated status as generalizations of the law in the form of regulation. Published primarily to assist taxpayers in interpreting the Code, they are still considered non-binding “guidelines” by the Service. *Id.* at 695.

No regulations appeared. In 1975, responding to the application of the Mountain States Legal Foundation for exemption as a PILF and to the emerging question of accepting fees for public interest litigation, the Service began to address the field in more detail through additional rulings and procedures.¹⁶²

Revenue Ruling 75-74, in response to the application of the Mountain States Legal Foundation, contains the most direct and detailed statement of the Service's philosophy on public interest law. The ruling lays an elaborate factual predicate including the following statements about the applicant:

The organization has engaged in "public interest" litigation in areas such as environmental protection, urban renewal, prison reform, freedom of information, injunction suits challenging governmental and private action or inaction, and "test" cases of significance to the public.

.
The members of the board are prominent attorneys, law professors and leaders of public interest organizations.

.
The criteria of the litigation committee include: whether the case involves a matter of public important interest: whether the individuals or groups involved cannot afford competent private legal counsel.

.
The organization does not accept cases in which private persons

162. Rev. Proc. 75-13, 1975-1 C.B. 662; Rev. Rul. 75-74, 1975-1 C.B. 152; Rev. Rul. 75-75, 1975-1 C.B. 154; Rev. Rul. 75-76, 1975-1 C.B. 154; Rev. Rul. 76-5, 1976-1 C.B. 146. During the hiatus between 1970 and the more recent guidance on public interest law, the Service was involved in one reported law suit concerning the qualification of a public interest law firm. *Center for Corp. Responsibility v. Schultz*, 368 F. Supp. 863 (D.D.C. 1973). The organization in question declared among its charitable purposes the promotion of corporate awareness for the needs of minorities and environmental protection. These purposes were to be effected by, among other means, proxy contests and litigation. When the Service objected to proxy contests as a charitable activity, the applicant reorganized itself into two entities, one for proxy contests and one for litigation and other activities, the latter entity established under the criteria of Revenue Ruling 71-39. The Service continued to oppose exemption of the litigation group, in part because it viewed the group's litigation as not sufficiently "objective." Heavily influenced by evidence that the Service's anti-exemption position was directed by White House opposition to the organization for political reasons, the opinion centers on the White House intrusion and the plaintiff's attempts to identify it through discovery. Among the facts in the record were memoranda on the subject by White House counsel John Dean, and the fact that the organization had been awaiting Service action on its application for almost three years. The court overruled the Service and found the group qualified as a charitable organization. On the public interest law question, the Court found:

The three requirements which the Defendants now say the Plaintiff's public interest litigation failed to meet, appear to have been created for this case. Nowhere does Revenue Procedure 71-39 require: "objectivity" in suit selection, a separate "independent" board to govern policies and programs, or that the subject matter of the suit involve charitable activities.

Id. at 876. The Service's more recent revenue rulings, Ruling 75-74 in particular, however, do emphasize the importance to the Service of a board or committee, "representative of the public interest," which supervises the firm and selects its cases. Rev. Rul. 75-74, 1975-1 C.B. 152, 153.

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have a sufficient economic interest in the outcome of the litigation to justify the retention of private counsel.

The organization's financial support is derived from grants and contributions.

Accepting these statements as accurate, as it must in the "organizational test," the Service found exemption appropriate under the following rationale. Firms of this type provide legal representation in issues of significant public interest, "where such representation is not ordinarily provided by traditional private law firms." In this way courts and administrators will review issues they would not otherwise receive. "A board or committee representative of the public interest" selects the cases in which representation is warranted. Beyond the board's decisions, however, the ruling emphasizes that "charitability is also dependent upon the fact that the service provided by public interest law firms is distinguishable from that which is commercially available." Commercial service to members of a community, even if done on a not-for-profit basis, is not charitable. In the typical public interest case, "no individual plaintiff has a sufficient economic interest to warrant his bearing the cost of retaining private counsel." This lack of economic feasibility in public interest cases "is an essential characteristic" distinguishing PILFs from private firms, and "is a prerequisite of charitable recognition." In its most relevant aspect, then, Rev. Rul. 74-74 expands on Rev. Proc. 71-39 to establish the absence of commercial feasibility as the baseline criterion for a PILF.

Subsequent rulings continue the IRS's emphasis on commercial feasibility. Ruling 75-75, for example, interprets Ruling 75-74 as granting exemption "only as long" as the representation is not feasible for private firms. Ruling 75-75 denies exemption to a firm which accepts fees from its clients, no matter how minimal, because the mere expectation of compensation might be a "motivating factor" in taking the case.¹⁶³ The rationale is stated in the negative: it could not be said that the anticipation of fees would *not* affect case selection—emphasizing the importance of "untainted" case selection to the operation of a PILF as a charity. Similarly, the decision in 75-76 turns on whether a case involves "a sufficient economic interest to warrant the utilization of private counsel." Under the facts of this Ruling, receipt by a PILF of an after-the-fact award of attor-

163. This ruling and its contemporaries on the receipt of attorneys fees, Rev. Proc. 75-13 1975-1 C.B. 662 (imposing, among other things, a ceiling on attorney's fees not to exceed 50% of a PILF's budget); Rev. Rul. 75-76, 1975-1 C.B. 154 and Rev. Rul. 76-5, 1976-1 C.B. 146, have been strongly criticized as unnecessarily restrictive and crippling to the practice of public interest law. *E.g.*, J. Phillips, *Advocacy Via the Judicial Process: Problems of Operating a Public Interest Law Firm Under Present Restrictions Imposed by the Internal Revenue Service*, presented at the Practising Law Institute's Seventh Biennial Conference, *Tax Planning for Foundations, Tax Exempt Status and Contributions* (1978) (cited in S. Weithorn, 1 *Tax Techniques for Foundations and Other Exempt Organizations* 5-86 (1979)); COUNCIL FOR PUBLIC INTEREST LAW, *supra* note 95, 161 at 306-311.

neys' fees is found not to affect the "economic feasibility of litigation to the client," and is therefore appropriate and consistent with the charitable exemption.

Revenue Ruling 76-5 puts even stronger language into the "economically feasible" test. In describing its precedent rulings, the Service here states that "the key factor" distinguishing PILFs from private firms is that PILF cases would not be commercially feasible for the private bar.¹⁶⁴

In short, from the interpretative rulings of the IRS comes an affirmation of those principles underlying the recognition of all charities, and required in the 1970 guidelines for the recognition of public interest law. The Service will rarely gainsay, and even more rarely gainsay successfully, a charitable organization's objectives so long as they are supported by an identifiable public benefit. The Service will look closely, however, at the means by which these objectives are accomplished, and watch that a charity's activities are not substantially directed to insiders. Of additional and specific application to public interest law firms, the Service has increasingly emphasized—from consideration as a "factor," to "an essential characteristic," to a "prerequisite," and most recently "the key factor"—the requirement that the cases undertaken by PILFs not be "economically feasible" for the private bar. These two requirements become the principal standards for examining the activities of the business-sponsored interest law firms.

III. THE BUSINESS PUBLIC INTEREST LAW FIRMS

Because of our special position, and because many of you often prefer to maintain a low profile where direct confrontation with gov-

164. A more recent Revenue Ruling in this field addressed the qualification of environmental litigation as an exempt activity—in some respects a broader, and in some a more narrow, question than the qualification of a public interest law firm. Rev. Rul 80-278, 1980-2 C.B. 175. Ruling 80-278 declared that an otherwise qualifying organization formed to protect and restore environmental quality may have as its "principle activity" instituting litigation "as a party plaintiff" to enforce environmental legislation, and obtain an exemption under § 501(c)(3). The Service justified its ruling on two grounds: a recognition that "efforts to preserve and protect the natural environment for the benefit of the public constitute a charitable purpose" within § 501(c)(3); and "Congressional approval of private litigation as a desirable and appropriate means of enforcing environmental statutes." This begs the question whether the Service's concept of charity includes opposing the enforcement of these same federal environmental laws. A quite different basis for exemption would have to be found, the inherent charity of the litigation itself, returning us once again to the essential credential of public interest law—access to the legal system for the otherwise unrepresented public. Whether the exempt "pro-environment" organization could operate through its own staff counsel is not addressed in the Ruling. No logical distinction comes to mind, however, between out-of-house and in-house counsel; the environmental goals and congressional sanctions—the two bases of the Service's Ruling—remain unchanged. If this is so, a categorical exemption from the requirements of Rev. Proc. 71-39 1971-2 C.B. 575 and its progeny is available to all environmental PILFs. Such an exemption could make a major difference in their operations relating to fee-sharing and attorney's fee recoveries. Whether an environmental PILF could rely on Revenue Ruling 80-278 to avoid the fee restrictions has yet to be tested.

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ernment agencies is concerned, we are the logical spearhead to do the job.

—Joseph J. Burris, Chairman,
Pacific Legal Foundation,
to a gathering of corporate
counsel in New York City, 1979¹⁶⁵

The business-sponsored public interest law firms arose in the 1970's along with a variety of institutes, foundations, think-tanks, research centers, and committees promoting a philosophy which has come to be known as the "New Right." To a degree, these firms simply reflect New Right values in the judicial system. On closer examination, however, they particularly reflect the values of American business and its efforts to affect decisionmaking through judicial action. This overlay of conservative philosophy on an enterprise largely created, funded, and directed by profit-making corporations is the earmark of the business PILFs. It is also the problem they raise under the Internal Revenue Code's concepts of charity and public interest law.

Into the 1970's, public interest groups were concerned with causes primarily, if simplistically, perceived as liberal.¹⁶⁶ Their initial ventures into litigation and lobbying were funded by private foundations such as Ford or Rockefeller, and later supplemented by contributions from individual members and small donors.¹⁶⁷ The organizations often supported the exercise of government authority to achieve their goals in such areas as integration, employment rights and consumer safety.¹⁶⁸ Their efforts also

165. *Visitors from California*, N.Y. Times, Jan. 19, 1979, at D4.

166. The "liberal" label for public interest law can be misleading. Environmental protection, for example, one of the leading PILF issues of the 1970's, has been strongly backed by political conservatives. Senate majority leader Howard Baker was sponsor and floor leader for the far-reaching Federal Water Pollution Control Act Amendments of 1972, Pub. L. No. 92-500, 86 Stat. 816 (1972). Representative Butler Derrick of South Carolina has received high marks from the Congress-Watching League of Conservation Voters (LCV), League of Conservation Voters, *How the U.S. House of Representatives Voted on Energy and the Environment* (1984) (on file with author). Some of the most outspoken conservative columnists are outspoken as well on the need to protect natural resources. See J. Kilpatrick, *Species Doubly Endangered* (1982) (on file with author) (advocating reauthorization of the Endangered Species Act). On the other hand, the "liberal" attitudes of most public interest lawyers are undeniable: a recent poll of the leaders of 74 public interest groups shows, for example, greater approval for Gloria Steinem and the Sandinistas than for Ronald Reagan and the Moral Majority. See *Very Interesting*, Wall St. J., June 13, 1983, at 22.

167. See *supra* p. 1443. Additional funding has also been provided by government agencies by grant or contract, and by private corporations. This funding has never been a major part of PILF budgets, because, among other reasons, it is often restricted to education programs and not available for lobbying or litigation.

168. The word "often" is used advisedly, as it was not unusual for the early PILFs to oppose the exercise of government authority. Much of the litigation of the Environmental Defense Fund for example, was in opposition to government proposals that affected scenic rivers, wetlands, and other natural systems. It would be likewise difficult to characterize any of the ACLU's litigation as promoting expanded government authority. Increased government promotion of nuclear energy, on the other hand, has no more active supporters than General Electric, Westinghouse, and the other major contractors in the field, many of whom contribute to the business PILFs. One's perspective on "big

tended to embarrass private corporations as major as General Motors that resisted these goals.¹⁶⁹ Through their success in the courtroom, they set the stage for a backlash. They also set the example.

Conservative institutions are not new to American life. The American Enterprise Institute and Georgetown University's Center for Strategic and International Studies have been prominent centers of conservative thought since World War II. In the mid-1970's, however, with rising anxieties over the state of the economy, government, and national defense, more activist organizations promoting conservative causes in labor, economics, civil liberties, and the media bloomed.¹⁷⁰ As it had with their liberal counterparts, start-up funding came from a handful of foundations, ones for the most part established by major corporations.¹⁷¹ Unlike their predecessors, substantial funding also came directly from American businesses as large and diverse as Weyerhaeuser, Ford, Reader's Digest, Coca-Cola, Exxon, and IBM. Their tax-exempt status was a significant draw. Tax-exempt charities are safe: In the words of a former member of the IRS's exempt organization division, "Nobody goes to jail for violating the law on gifts to tax-exempt organizations."¹⁷²

Within this spectrum, more than a dozen new tax-exempt public interest law firms emerged. Some of these firms—the National Right to Work Legal Defense Foundation and the Moral Majority Legal Defense Foundation, for example—concentrate on a single issue. Others, modeled after the Pacific Legal Foundation of Sacramento, California, pursue a broader agenda and include the Mountain States Legal Foundation, the Mid-America Legal Foundation, the Gulf and Great Plains Legal Foundation, the Mid-Atlantic Legal Foundation, the Southeastern Legal Foundation, the New England Legal Foundation, and the Capital Legal Foundation. It is this group that—because of their similarities to one another and their

government" will depend largely on whether one stands to make a profit from it. This is of course a perfectly proper motivation for the marketplace. Whether it is one that should also be subsidized as charitable is another question.

169. General Motors was of course the target of Ralph Nader's first book, *Unsafe at Any Speed*, R. NADER, *supra* note 111.

170. See generally *Hearts and Minds: the Conservative Network*, Wash. Post, Jan. 4, 1981, at A1 col. 1. The Post article identifies over seventy currently operating conservative organizations, grouped under the following headings: General Public Policy; National Security/Foreign Policy; Anti-regulation and Big Government; Law and Justice; Economics; Legislation; Conservative Values; Legal Activism (the business PILFs); Media; Campus Outreach; Blacks/Minorities; Individual Liberty; Education; Labor; Magazines; and Others.

171. These foundations include the John M. Olin Foundation (agricultural chemicals, arms, and ammunition), the Bechtel Foundation (construction), the Adolph Coors Foundation (brewing), the Smith Richardson Foundation (Vicks Vaporub), and the Lilly Foundation (pharmaceuticals). See M. Colwell, *The Role of Conservative Foundations in Developing Nonprofit Law Firms Which Serve the Interests of Business* (1982) (attempting to piece together corporate funding for the Pacific Legal Foundation and other business PILFs from corporate foundation reports) (unpublished paper, presented to Am. Soc. Ass'n, 1982, cited with permission of the author) [hereinafter cited as Colwell Report].

172. *Hearts and Minds: The Conservative Network*, *supra* note 170, at A14, col. 6.

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ties to an umbrella organization called the National Legal Center for the Public Interest—is the subject of this study.¹⁷³ The genesis of this group lay with the United States Chamber of Commerce.

A. *The Powell Memorandum*

In 1971, the U.S. Chamber of Commerce contacted Lewis F. Powell, Jr., then an attorney in private practice,¹⁷⁴ and asked his views on problems facing the American business community. Mr. Powell fashioned his recommendations in a confidential memorandum to the Chamber, entitled “Attack on American Free Enterprise System,” shortly before he was appointed an Associate Justice of the United States Supreme Court.¹⁷⁵

The Powell memorandum is a valuable historical document, capturing the mood of the American business community only thirteen years ago through one of its most widely respected spokesmen at the bar. It opens: “No thoughtful person can question that the American economic system is under broad attack.”¹⁷⁶ Leading the attack were the “single most effective antagonist of American business,” Ralph Nader, and the author Charles Reich, whose book, *The Greening of America*, Powell characterized as a “frontal assault” on “our government, our system of justice, and the free enterprise system.”¹⁷⁷ Businessmen were ill-equipped to combat those who “propagandize against the system, seeking insidiously and constantly to sabotage it.”¹⁷⁸ The time was long overdue for the resources of American business to be “marshalled against those who would destroy it.”¹⁷⁹

The counter-offensive proposed by Powell was ambitious. “[I]ndependent and uncoordinate activity by individual corporations” would not suffice. Moreover, “there is the quite understandable reluctance

173. Other firms of the same genre but which do not have the National Legal Center ties include the Atlantic Legal Foundation (Delray Beach, Fla.), Connecticut Legal Foundation, (Fairfield, Conn.), Florida Legal Foundation (Ft. Meyers, Fla.), Great Basin Legal Foundation (Provo, Utah), North Star Legal Foundation (Minneapolis, Minn.), Texas Legal Foundation (San Antonio, Texas), and the Washington Legal Foundation (Washington, D.C.).

174. Powell was a partner in Hunton and Williams, one of the largest corporate firms in Virginia and one of the most influential firms outside of Washington, D.C., on national policy. He was also a past President of the American Bar Association and a member of numerous national boards and committees.

175. Soon thereafter, the syndicated columnist Jack Anderson obtained copies of the confidential memorandum and began publishing excerpts for his readers. The Chamber of Commerce then published the Powell memorandum in full. *The Powell Memorandum*, WASHINGTON REPORT, Supp. No. 2900, U.S. Chamber of Commerce (1971).

176. *Id.* at 2. A footnote to this statement adds that “[t]he American political system of democracy under the rule of law is also under attack, often by the same individuals and organizations who seek to undermine the enterprise system.” *Id.* at 2 n.1.

177. *Id.* The Nader and Reich themes, consumerism and environmentalism, surface repeatedly as the *bête-noirs* of the business community, and a major focus of the business PILFs.

178. *Id.*

179. *Id.* at 4.

on the part of any one corporation to get too far out in front and to make itself too visible a target."¹⁸⁰ This is where the Chamber came in. It should launch scholars and speakers, an "evaluation of textbooks" to address problems in schools, "constant surveillance" of the media and, "in the final analysis," the "pay-off" area: action in politics and the courts.¹⁸¹ The judiciary "may be the most important instrument of social, economic and political change."¹⁸² Public interest law firms were particularly active in this area, and their impact has "not been inconsequential."¹⁸³ The memo noted:

This is a vast area of opportunity for the Chamber, if it is willing to undertake the role of spokesman for American business and if, in turn, business is willing to provide the funds.

As with respect to scholars and speakers, the Chamber would need a highly competent staff of lawyers. In special situations it should be authorized to engage, to appear as *amicus* counsel in the Supreme Court, lawyers of national standing and reputation. The greatest care should be exercised in selecting cases in which to participate, or the suits to institute. But the opportunity merits the necessary effort.¹⁸⁴

Thus the concept for a business-interest litigation center was born. It is worthy of note that, in Powell's mind, the proposal was frankly and flatly a business operation, corporate-supported and Chamber-run. The idea that such legal action would itself qualify as a public interest law firm either did not cross his mind or, if it did, was apparently rejected.

B. *From Powell to Pacific*

Powell's memorandum was widely disseminated by the Chamber of Commerce. On the Pacific coast, industrialists were smarting from a spate of publicity and lawsuits over, among other controversies, the Santa Barbara oil spill, the Alaska pipeline, the Mineral King development, and a new California state court opinion requiring environmental impact assessments for major private construction projects.¹⁸⁵ The Union Oil Company

180. *Id.* The "taking the heat" function of the Chamber, and of the business PILFs, is one of their strongest selling points to the business community. See *supra* note 165.

181. *Id.* at 5-7.

There should be no hesitation to attack the Naders, the Marcuses and others who openly seek destruction of the system. There should not be the slightest hesitation to press vigorously in all political areas for support of the enterprise system. Nor should there be reluctance to penalize politically those who oppose it.

Id. at 8.

182. *Id.* at 7.

183. *Id.*

184. *Id.*

185. *Friends of Mammoth v. Board of Supervisors*, 8 Cal. 3d 247, 502 P.2d 1049, 104 Cal. Rptr.

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was involved in both the pipeline and the spill; Union Oil's president, Fred Hartley, was also President of the California Chamber of Commerce. Hartley contacted James Archer, President of the California Bar, to explore the prospect of a business-interest law firm.¹⁸⁶ Archer, whose private firm had represented the losing side in the California impact assessment case, contacted attorney William French Smith. Prominent among Smith's clients, in addition to then-Governor Reagan, was J. Simon Fluor of the Fluor Corporation. Environmental litigation had caused significant delays on the construction of the Alaskan pipeline, for which Fluor's company was a major contractor. Similar challenges threatened off-shore drilling and the Mineral King development.¹⁸⁷ Fluor was ready to help.

Meanwhile, Powell's memorandum stimulated developments inside the California Chamber. Roy Green, the director of the California Chamber's Department of Manpower and Human Relations, proposed that the Chamber start a non-profit law firm.¹⁸⁸ A study of the proposal ensued and, in an unpublished memorandum dated September 28, 1972, recommended the creation of a public interest legal foundation. Its orientation towards the Chamber's business members was unequivocal:

The purpose of the proposed privately-funded legal foundation is to meet the challenge of those who have gone to the courts to seek change in public policy in areas which vitally affect private, industrial, business and agricultural interests, and to successfully deter government agencies from the disruption of their daily functions.¹⁸⁹

The Chamber also recognized, however, that qualification under section 501(c)(3) was desirable: "[C]ontributions [to the law foundation] which

761 (1972).

186. Weinstein, *Defending What? The Corporations' Public Interest*, JURIS DR., June 1975, at 39, 40. The information on the founders of the Pacific Legal Foundation is taken largely from this interview.

187. An early Chairman of Pacific Legal Foundation Board of Trustees is quoted as stating that, frustrated by litigation such as that over the Alaska Pipeline, Fluor wanted to "figure out what kinds of things to create to fight back in that arena." J. Wheaton, Pacific Legal Foundation, at 9 (1983) (unpublished manuscript, on file with the author). Wheaton's research of PLF was similar to that conducted in this study, with the addition of interviews with PLF's President and an examination of its success rate in court. In contrast to PLF's frequently-asserted success in "over seventy percent" of its cases, *see* letter from N. Rousselot, chairman, board of directors, National Wool Growers Association, Inc. (Feb. 20, 1984), Wheaton, examining 125 PLF cases, found PLF's position (as amicus, intervenor or party) prevailing 41 percent of the time, failing 53 percent of the time, and indeterminate the remaining six percent. J. Wheaton, Pacific Legal Foundation Won-Loss Record (July, 1983) (unpublished manuscript on file with the author). Much of this research has subsequently been published in Wheaton, *The Pacific Legal Foundation, Public Interest for Profit, The Truth*, May 9, 1983, at 1, col. 1.

188. Berthelsen, *Big Business, Ecologists Clash Nears*, Sacramento Bee, Mar. 4, 1973, at 1, col 1. The information following concerning the California Chamber of Commerce's initial involvement is taken largely from this article.

189. *Id.*

are made to legal services projects are tax deductible, a factor which assuredly would increase the interest of the private sector in the foundation.¹⁹⁰

In this fashion, in early 1973, the Pacific Legal Foundation was born. Its offices were located on the fourth floor of the Chamber of Commerce building in Sacramento.¹⁹¹ Its rent was paid initially by Sacramento developer George McKeon.¹⁹² Roy Green, formerly deputy director of the Chamber, became its executive vice president and administrator. With backing from other Chamber members, and from J. Simon Fluor in particular, Pacific Legal's financing was assured. In the words of J. Robert Fluor, who since inherited J. Simon Fluor's position in the Fluor Corporation:

Si [Fluor], working closely with Fred Hartley, Chairman of the Union Oil Company and then President of the California Chamber of Commerce, and with the Chamber's leadership, literally pioneered the public interest law concept Si saw clearly that there was an imbalance—a vacuum in the courts—which was hurting private enterprise.¹⁹³

Phrased less elegantly by PLF's president, Fluor "almost single-handedly raised the seed money to get us launched. He got his ten buddies, or whatever it was, to return favors and give some money to open the doors."¹⁹⁴ J. Simon Fluor became Pacific Legal Foundation's first Chairman of the Board.

C. *Pacific Legal Foundation*

The Pacific Legal Foundation ("PLF") was the first business PILF entry into the field. Its initial staff had in effect already been on the job. In 1971, California made major cutbacks in its welfare system. Anticipating a reaction in the legislature and in the courts, the Reagan Administration established a special task force of attorneys to defend the reductions. The task force succeeded, and from this experience emerged a nucleus of lawyers who had enjoyed the experience and were ready to do more.¹⁹⁵

190. *Id.*

191. *Id.*

192. *Id.*

193. Presentation by J. Robert Fluor at the Second Annual J. Simon Fluor Memorial Award, Honoring the Associated General Contractors of American for Outstanding Contributions to Public Interest Law, Dec. 8, 1977 [hereinafter cited as Fluor Memorial].

194. J. Wheaton, *supra* note 87, at 9.

195. The early members of the Pacific Legal Foundations staff included the assistant director of the California Welfare Department, the deputy director of the Department of Social Welfare, the deputy state welfare director for legal affairs, and a senior attorney from the state attorney general's office; all were involved in the welfare reform project. Barnes, *Pacific Legal Foundation Redefines 'Public Interest' Law*, TRIAL MAG., May, 1977, at 61.

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Their readiness coincided with the awakening of business leaders in California that they were losing in the courtroom and that they had better do something about it.

The emphasis of the new organization reflected the priorities of its sponsors. Number one on the list were the constraints of environmental laws. California had been on the leading crest of environmentalism in the early 1970's, and for some California business leaders the word alone was provocation:

I loathe environmentalists I say we should preserve the redwoods, sure, maybe 100 acres of them to show the kids. Those environmentalists who talk about preserving wilderness in Alaska—how many goddamned bloody people will end up going there in the next hundred years to suck their thumbs and write poetry? . . . This country needs the oil. If my country doesn't come ahead of my view, then I don't think much of my country.¹⁹⁶

The Pacific Legal Foundation got the message. Asked his opinion of the "most critical" area of public interest law, the firm's then executive legal director replied, "environmental law."¹⁹⁷ By way of illustration, he described the firm's early actions supporting the use of DDT, the construction of a dam and reservoir project, the use of herbicides in national forests, and the use of public grazing lands without environmental impact review.¹⁹⁸ Whatever the legal merits of these cases, they established a pattern at an early date for the activities of this firm and its progeny. Environmental laws hurt business. Environmental cases would be the priority. PLF's positions would be those of the business interests in the case. These same interests would support and direct the Foundation.

While business support for the PLF has been considerable, it is not easy to particularize. Annual federal tax returns for public charities disclose gifts, grants, and contributions only as a lump sum.¹⁹⁹ The PLF reported receiving \$250,510 in 1973. The next year, revenue doubled to \$564,910. Foundations aside, the firm relied on the direct promotion of individual business interests from the outset. In August, 1973, *Agrichemi-*

196. Justin Dart, quoted in Williams, *Farewell to a Forest*, BOSTON MAG., Nov. 1982, at 133. Dart, of the Dart drugstore chain, was also an active fund raiser for the Republican Party and a close friend of then Governor Reagan. *Id.* See also the remarks of Union Oil President Fred Hartley, a Pacific Legal Foundation founder and financier: "What stands in the way of that pipeline [the Alaska Pipeline] now is unemployed lawyers making a living off misled people who supply dues and fees to environmental groups that are perhaps led by men of ill will." Weinstein, *supra* note 186, at 39, 40. Another founder of the Pacific Legal Foundation was Edwin Meese, currently President Reagan's White House advisor. Blodgett, *The Ralph Naders of the Right*, A.B.A. J., May 1984, at 70, 74.

197. *Pacific Legal Foundation: Establishment's Answer to the Storefront Lawyers*, PACIFIC BUS., July-Aug. 1975, at 9, 10.

198. *Id.* at 10-11.

199. Pacific Legal Foundation Income Tax Return for 1981, Form 990, pt. V, line 11.

cal Age told its readers that "we are really sold on this one, and we hope to sell you . . . [T]he [Pacific Legal] Foundation has already discovered that agriculture will be one of its largest areas of work."²⁰⁰ Three years later, the California Chamber of Commerce was still sending its members PLF brochures with cover letters from its president stating: "For too many years the opposition, which has been *well financed* in their efforts, has been the only voice in court. That's why I'm writing you now for your support."²⁰¹ In October 1980, PLF itself sent promotions to "Dear Business Leader," explaining that "Pacific Legal Foundation is challenging government growth and government controls that are detrimental to our free enterprise system."²⁰² The letter continued with the following declaration: "PLF believes it is imperative that business once again be allowed to concentrate on its primary purpose—production of needed goods and services."²⁰³ A more recent PLF promotion, sent to the subscribers of business magazines, requests the donor to list not his or her name, but rather the "name of firm" and the "executive contact."²⁰⁴ Business interests were being served. Business interests were going to finance the service.²⁰⁵

By 1981, the firm's annual budget had grown to over \$2,000,000, more than eighty-seven percent of which came in major contributions from among others, Southern Pacific (one of the largest land-holding and development corporations in California), San Diego Federal Savings and Loan, Safeco Insurance, Title Insurance Corporation, Knudsen Corporation, Santa Fe Railway Company, Fluor Corporation, Arthur Young and Company, several corporate foundations (e.g., Weyerhaeuser, Bank America, Gulf Oil, Monsanto, Coors, Alcoa, Ford, ARCO, Venus Oil, Superior Oil), and various farm, cattlemen's, labor, construction, and real estate associations.²⁰⁶ These contributions have been of sufficient size and

200. *Defending your Rights*, *AGRIC. AGE*, Aug. 1973 (editorial). Indeed, in its first year the firm had already entered three proceedings to support the use of chemicals on U.S. Forest Service lands. Jordahl, *Legal Foundation Gains Momentum*, *Sacramento Press-Journal*, Nov. 23, 1973, at 1.

201. Letter from President, California State Chamber of Commerce, (received Feb. 10, 1976) (on file with author) (emphasis in original).

202. Letter from Thomas M. Hamilton, Chairman of the Board, Pacific Legal Foundation (Oct. 10, 1980).

203. *Id.*

204. J. Wheaton, *supra* note 187, at 17.

205. A contemporary example of this quid pro quo is provided by a solicitation from the National Wool Growers Association dated February 20, 1984, and captioned "Woolgrowers mean business." The letter urges recipients to contribute to PLF, a voice that "represents our interests" in the courts. The letter lists "many battles" PLF has "fought with and for us," including actions to register Compound 1080 for predator control, to "keep grazing fees low," and to permit the use of Diethylstilbestrol (DES), a feedlot chemical. The letter concludes: "Let's help them help us in our struggle to keep American agriculture the world's best!" Letter from N. Rousselot, *supra* note 187.

206. Pacific Legal Foundation Income Tax Return for 1981, Form 990, pt. V, line 11. Other reports add direct gifts from Pacific Gas and Electric, San Diego Gas and Electric, Pacific Power and Light, Southern California Gas, Southern California Edison, Pacific Telephone and Telegraph, Standard Oil of California, Union Oil, Texaco, Atlantic Richfield, and a number of executives of these

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regularity to enable PLF to set aside a considerable endowment: \$392,729 in 1981 and \$696,529 in 1982.²⁰⁷ PLF's audited financial statement of February 28, 1982, showed total revenue at over \$2.7 million.²⁰⁸ The salary of its chief executive was over \$90,000 in 1981,²⁰⁹ and over \$100,000 in 1982.²¹⁰

PLF's trustees are its only members. It has no other members.²¹¹ They elect new trustees annually in a process that is largely self-perpetuating; more than half of PLF's trustees in 1983 were on its board at the start, ten years before.²¹² In 1982, there were nineteen trustees: ten corporate executives, seven partners of private law firms in major corporate practice, one professor of law, and the firm's staff director. The executives on the board alone, excluding attorney members with corporate clients, were officers and/or directors of at least twenty-five separate business corporations involved in, inter alia, construction, nuclear power, agriculture, oil production, timber production, and real estate.²¹³ Among other responsi-

and other corporations and of private law firms. Gerber, *The Pacific Legal Foundation: Its Goal is Deregulation* CAL. LAW., Nov. 1981, at 26, 28. The firm's IRS Form 990's for recent years indicate that this percentage has remained fairly stable, with over 40% of revenue coming from corporate and private foundations and another 40% plus from large private donors (corporations, private law firms, and individual businessmen).

207. Coopers & Lybrand Report on Examinations of Financial Statements of Pacific Legal Foundation for the years ended Feb. 28, 1982, and 1981, at 2.

208. *Id.*

209. Pacific Legal Foundation Income Tax Return for 1981, Form 990, at 4.

210. Pacific Legal Foundation Income Tax Return to the State of California for the year Mar. 1, 1981, to Feb. 28, 1982, Form CT-2.

211. Bylaws, Pacific Legal Foundation, § 11 (1973) ("The by-laws of this corporation shall not provide for members of the corporations as such, and all the persons for the time being constituting the Board of Trustees shall be . . . the members.").

212. J. Wheaton, *supra* note 187, at 22.

213. PLF's 1981 board, excluding the interests of its private attorney members, included the vice-president of the Borg-Warner Corporation, the president of Southern Pacific, the chairman of Kilroy Industries, the president of John F. Otto, Inc., the executive vice president of Great American Federal Savings and Loan, the president of Brock Plant Genetics, and the chairman of U.S. Leasing International. PLF Income Tax Return for 1971, State of California, Form CT-2, Feb. 28, 1982, at statement 1. The interests of some corporations are more apparent than others. Borg-Warner, for example, manufactures systems used in the nuclear power industry; Southern Pacific, with 450,000 acres of timber, 160,000 acres of farmland, 30,000 acres of industrial real estate, and 1.5 million acres of mineral rights, is one of the largest landowners in the West. R. Zeidner, *The Right Takes on the Public Interest: The New Public Interest Law Movement* (1983) (unpublished manuscript, on file with author). These PLF board member interests also spread laterally with additional corporate positions held by the same members. The president of the Southern Pacific Company, for example, is also deputy chairman and director of the Federal Reserve Bank of San Francisco, a director of Industrial Indemnity Co., Southern Pacific Land, Southern Pacific Transportation, Ticor (an insurance subsidiary of Southern Pacific), STANDARD & POORS DIRECTORY OF CORPORATIONS 2465-66 (1984), and Chairman and chief executive officer of Southern Pacific Communications. STANDARD & POORS, REGISTER OF CORPORATIONS, DIRECTORS AND EXECUTIVES 449 (1984). The Chairman of U.S. Leasing International is, by way of another example, a director of the Bank of California, a director of Pope & Talbot (lumber, veneer, pulp and tissue paper), *id.* at 2020, a director of Gapstores, Inc. (chainstores), *id.* at 1056, a director of DiGiorgio Corp. (wholesale food and drug products, real estate), *id.* at 762, managing general partner of Ala Moana Hawaii Properties (real estate), and director of Bancal Tri-State Corp. (a bank holding company), 2 *id.* at 1374. Throughout this study, reference was made to PILF literature for board and other committee memberships, and to the Stan-

bilities, the trustees approve litigation, which is carried out by a staff of twenty-two attorneys (sixteen in Sacramento and six in Washington, D.C.) and cooperating attorneys with offices in Seattle, Anchorage, Washington, D.C., and Santa Monica.²¹⁴

Pacific Legal Foundation's Santa Monica office was opened in 1981. In its annual report for that year, PLF provided the following rationale for this separate venture within its home state: "Responding to calls for legal support from Santa Monica homeowners, small businesses and taxpayers, the Foundation is monitoring developments there and preparing to legally challenge local government actions that interfere with the rights of private citizens."²¹⁵ Listed among those rights which called for PLF action were a "challenge to the city's rent control ordinance," "attempts at unlawful land use control," "improper public contracting procedures," and "dismantling the Santa Monica airport to make room for private housing."²¹⁶ Even disregarding the several major real estate investment and development corporations on the PLF's board that might have an interest in these issues, one of the first questions that comes to mind is why the affected Santa Monica landlords, developers, contractors, and private aircraft owners could not obtain representation in a traditional fashion from the private bar. This is the paramount question in examining the actual dockets of this PILF and its progeny.

The summary which follows reflects the evaluation of each PLF action identified in this study against the IRS's primary requirements for public interest law: the absence both of private inurement and of an economic interest sufficient to enlist the private bar. An explanation of the analysis used in this evaluation is provided in Appendix II, as is a description of the methods of research used. Application of the public interest law criteria to PLF's cases was less ambiguous than initially feared. Where the call was difficult, the proceedings were rated questionable; in most instances, however, the judgment appeared clearly one way or the other. The results are as follows:

dard & Poors and Martindale-Hubbell (legal directory) services to identify the corporate interests which they represent. The references are shown here by way of example; for the sake of brevity, they are not annotated through the study. The use of this information, and its limitations, in evaluating PILF cases is discussed *infra*, Appendix II. Every effort has been made here to avoid identifying individual directors, committee members and law firms by name: there is no suggestion of impropriety on their parts. The question is simply whether a tax-exempt PILF may pursue and support the same commercial interests as those which have been identified on its controlling boards.

214. Wheaton, *The Pacific Legal Foundation, Public Interest for Profit*, The Truth, May 9, 1983, at 6, col. 3.

215. PACIFIC LEGAL FOUNDATION, A NEW TIME FOR AMERICA 2 (1981).

216. *Id.*

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TABLE 1
PACIFIC LEGAL FOUNDATION

Valid	46
Invalid	70
<u>Questionable</u>	<u>16</u>
Total	132

Numbers such as these, of course, fail to tell a full story. For this reason, PLF's litigation is described below in several subject areas, in sufficient detail to indicate the kinds of problems this litigation presents for the practice of public interest law. Included are PLF's actions in energy and utilities regulation, in the regulation of chemicals and toxic substances, in land use and related air quality controls, and in minority rights.

1. *Utilities and Energy Development*

PLF's energy docket is substantial. The firm has joined with some of the largest energy corporations in America to challenge requirements for restoration of strip-mined lands,²¹⁷ to contest the need for an environmental impact statement on federal coal leasing,²¹⁸ to oppose water pollution control requirements for existing coal-fired generating facilities,²¹⁹ to open federal wilderness areas to oil and gas exploration,²²⁰ to assist the development of hydroelectric power,²²¹ to oppose funding for citizen intervenors in Federal Power Commission proceedings,²²² to restrict the same Commission's review of transmission siting,²²³ and to oppose air quality restrictions on energy development.²²⁴ In each of these cases, PLF advocated the development position. Its legal arguments were made more directly by the affected industries involved. Furthermore, in questions bearing upon

217. *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264 (1981).

218. *Kleppe v. Sierra Club*, 427 U.S. 390 (1976).

219. *Consolidation Coal Co. v. Costle*, 13 Env't Rep. Cas. (BNA) 1289 (4th Cir. 1979).

220. *PLF v. Watt*, 529 F. Supp. 982 (D. Mont. 1981), *modified*, 539 F. Supp. 1194 (D. Mont. 1982). The nominal confrontation between PLF and its former colleague, James Watt (who had directed the Mountain States Legal Foundation) produced evidence of at least an attempt at collusion in this case. In a "confidential" letter to the Justice Department, PLF's chief executive expressed concern that the courts might "question the existence of a true case or controversy," and complained that the Interior Department had not cooperated with Pacific's effort to "build a record" in the case. *Students in Law School Raise Collusion Issue in Watt Wilderness Decision*, N.Y. Times, Dec. 14, 1981, at A22, col. 1.

221. *TVA v. Hill*, 437 U.S. 153 (1978).

222. *Id.*

223. *Greene County Planning Bd. v. Federal Power Comm'n*, 559 F.2d 1227 (2d Cir. 1976), *cert. denied*, 434 U.S. 1086 (1978).

224. *Western Oil & Gas Ass'n v. California State Air Resources Bd.*, 129 Cal. App. 3d 682, 181 Cal. Rptr. 199 (1982).

nuclear power and the regulation of utilities, PLF's ties to the benefited corporations were remarkably close.

PLF has entered at least seven lawsuits involving nuclear energy development.²²⁵ PLF's co-plaintiffs and amici in these actions have included the American Public Power Association, the Atomic Industrial Forum, the nuclear power plant construction firms of Babcock and Wilcox and Construction Engineering, the Nuclear Energy Liability Insurance Association, Commonwealth Edison, Baltimore Gas and Electric, Duke Power Co., the National Rural Electric-Cooperative Association, the Allegheny, Northern Michigan, and Seminole Electrical Cooperatives and a number of construction and trade organizations. Two of these cases suggest that PLF's interest in nuclear energy development is more than philosophical.

In 1974, California enacted legislation that placed a moratorium on the licensing of new facilities until federal authorities had located a safe repository for nuclear wastes.²²⁶ Affected by the moratorium was the Sundesert nuclear plant project, then under construction by the San Diego Gas and Electric Company. It was Pacific Gas and Electric and Southern California Edison, however, that filed suit contesting the moratorium's constitutionality.²²⁷ San Diego Gas and Electric reportedly wished to bring the action itself, but decided otherwise because its Sundesert Plant, if completed, would have been subject to regulation by the State defendants.²²⁸ On the day of the Pacific Gas and Electric lawsuit, in a separate federal district, PLF filed suit along with such San Diego-oriented entities as the San Diego Coalition, the San Diego Section of the American Nuclear Society, and the San Diego Building and Construction Trade Council, challenging the constitutionality of the same California moratorium law.²²⁹ Although the suits raised essentially the same issue—federal preemption of the regulation of nuclear power—PLF's president explained that the suits were intentionally filed separately and “on the same day so that no one would end up being the lead case.”²³⁰ The tactical advantages of bringing the cases separately were two-fold. As the president elaborated, “[Y]ou have to realize the difference between PLF filing its lawsuit and PG&E filing its lawsuit. We're in much different positions. PG&E is regulated by the defendant, we aren't. That automatically makes a differ-

225. *E.g.*, *Duke Power v. Carolina Envtl. Study Group*, 438 U.S. 59 (1978); *Vermont Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519 (1978); *NRDC v. NRC*, 17 *Env't. Rep. Cas.* (BNA) 1457 (D.C. Cir. 1982); *PLF v. State Energy Conservation & Dev. Comm'n*, 659 F.2d 903 (9th Cir. 1981), *cert. denied*, 457 U.S. 1133 (1982); *Consumer Alert v. Abalone Alliance* (citation unavailable, case listed on PLF Income Tax Return for 1981, Form 990, at 5).

226. *Warren-Alquist State Energy Resources Conservation & Development Act*, CAL. PUB. RES. CODE §§ 25000–25986 (West 1977 & Supp. 1980).

227. *Wheaton*, *supra* note 214, at 11.

228. *J. Wheaton*, *supra* note 187, at 30a.

229. *PLF v. State Energy Resources Conservation & Dev. Comm'n*, 659 F.2d 903 (9th Cir. 1981), *cert. denied*, 457 U.S. 1133 (1982).

230. *J. Wheaton*, *supra* note 187, at 29.

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ent setting.”²³¹ The difference was in more than atmosphere. “We had narrow issues, and our case was designed for a summary judgment, while they had broader issues and their case was designed for trial. We got the summary judgment that established the law. They went to trial and the trial court followed our case.”²³²

The utilities’ benefit from PLF’s litigation might on this evidence be dismissed as coincidental, but for other coincidences surrounding the case. First, PLF clearly coordinated its plans with attorneys for both Pacific Gas and Electric and San Diego Gas and Electric.²³³ The consultations, furthermore, involved parties whose identities overlapped considerably. One PLF trustee, a board member since its founding, was also a senior partner in the private firm that represented San Diego Gas and Electric generally, and was in fact performing the utility’s legal work on the cancelled Sundesert Plant.²³⁴ This trustee is reported even to have participated in the board vote authorizing PLF’s suit against the California moratorium, explaining later that his vote was not a conflict of interest because San Diego Gas and Electric had just cancelled construction of the plant.²³⁵ PLF made its standing claim in the lawsuit, however, by arguing that, were the law invalidated, its clients could resume work at Sundesert.²³⁶

To compound these connections, another PLF trustee was then a senior member of the law firm that represented Pacific and San Diego Gas and Electric in their separate-but-coordinated action.²³⁷ Were further connections necessary, PLF’s board of trustees included attorneys who represented still other electric utilities, the vice-president of a firm that manufactured equipment for nuclear power plants, the executive of a firm engaged in the construction of nuclear plants, and the executive vice president and general counsel of the Great American Federal Savings and Loan Association, formerly the San Diego Federal Savings and Loan Association.²³⁸

The utility connections are also financial. Pacific Gas and Electric was one of the PLF’s founding supporters: It contributed \$5000 in 1973 and

231. *Id.* at 30a.

232. *Id.*

233. *Id.* at 11.

234. The firm is Luce, Forward, Hamilton & Scripps, of San Diego, California.

235. J. Wheaton, *supra* note 187, at 30, 31.

236. Motion of Pacific Legal Foundation for Leave to Participate as *Amicus Curiae* and Brief of *Amicus Curiae* in Support of Federal Power Commission, *Greene County Planning Bd. v. FPC*, 559 F.2d 1227 (2d Cir. 1977). J. Wheaton *supra* note 187, at 30a. For PLF’s position in the case, see *PLF v. State Energy Resources Conservation & Dev. Comm’n.*, 659 F.2d 903 (9th Cir. 1981), *cert. denied*, 457 U.S. 1133 (1982).

237. The firm is Gibson, Dunn & Crutcher of San Diego, California.

238. The corporations referred to are the Borg-Warner Corporation and the Knudsen Corporation. The names of individuals and law firms are, unless unavoidable, intentionally omitted from this study to avoid undue emphasis on personalities as opposed to the problem of institutional conflicts raised by this genre of public interest law firm. See *supra* note 213.

regularly thereafter, for a total of at least \$73,500 to date.²³⁹ Southern California Edison has contributed \$40,000 to date, Southern California Gas another \$52,000, San Diego Gas and Electric another \$7500, and Pacific Power and Light approximately \$4000.²⁴⁰ These contributions, as sizeable as they may be in the aggregate, do not suggest that PLF is owned by these utilities. What they do show is that the utilities have exerted strong influence on the firm through financing and leadership on its board of trustees, and that PLF responds to this influence by undertaking lawsuits which materially further utility interests. Whatever other rationales for PLF's involvement might be supplied—employee, employer, or consumer interests among them—these facts do not go away.

The Sundesert case is not an action out of context. PLF entered another lawsuit with the Pacific Gas and Electric Company to oppose restrictions on corporate expenditures in municipal elections.²⁴¹ It entered yet another to assist San Diego Gas and Electric recover damages for the effects of local zoning.²⁴² PLF recently brought still another suit against demonstrators at Pacific Gas and Electric's Diablo Canyon nuclear power plant.²⁴³ Although it would appear to have been the damaged party, the utility is not named as a party in the action. Instead, PLF is representing entities entitled The Pacific Gas and Electric Consumer Alert, the California Association of Utility Shareholders, and Santa Barbarans for a Rational Energy Policy, Inc. All three organizations reportedly receive financing from Pacific Gas and Electric and other utilities.²⁴⁴ Suits such as these have led one California state attorney to characterize PLF as "a stalking horse for the utilities."²⁴⁵ The statement is not without substance.

2. *The Regulation of Chemicals and Toxic Substances*

PLF's venture into chemicals litigation raises similar questions. One of its earliest initiatives was a suit on behalf of a private landowners association to allow the use of the prohibited pesticide DDT in forests of the Pacific Northwest.²⁴⁶ PLF likewise intervened in *Dow Chemical Corp. v.*

239. J. Wheaton, *supra* note 187, at 27.

240. *Id.*

241. *Id.* at 28.

242. *Id.* at 27-28.

243. *Consumer Alert v. Abalone Alliance*, (citation unavailable, case listed on PLF Income Tax Return for 1981, Form 990, at 5).

244. J. Wheaton, *supra* note 187, at 32.

245. *Id.* at 30a.

246. *PLF v. Train* was settled and therefore unreported. For a report of its filing, see PLF Report, May 1, 1974, at 2; for its dismissal as moot, see PLF Report, June 21, 1974, at 2. PLF represented an organization of private land and woodlot owners entitled the Tussok Moth Association, a group that is reported to have contributed funds to PLF during that same period of time, Letter from Ronald Zumbrun, Pacific Legal Foundation, to Henry Weinstein, Esq. (Aug. 9, 1974), at 2, and which, contributions aside, would appear to have been sufficiently pecunious and sufficiently interested in the outcome to retain private counsel.

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Blum,²⁴⁷ where some of America's largest corporations including Dow, U.S. Steel, and Chevron, several timber and construction associations, and four statewide electrical cooperatives sued EPA to reverse its ban on the herbicides 2-4-5-T and silvex.²⁴⁸ The arguments in the cases—that the EPA's suspension action was arbitrary and capricious—were common to all litigants. Chevron is a major contributor to PLF, and is represented by two major private law firms with partners on PLF's board of trustees. The American Farm Bureau Federation and several cattlemen's associations, additional co-plaintiffs with Dow Chemical, were also PLF donors.²⁴⁹

PLF's intervention in *Monsanto v. Kennedy*²⁵⁰ repeats the pattern. Here, Monsanto, the Continental Corp., the Society of Plastics Industries, Vistron, and the American Can Company appealed a federal regulation that characterized substances leached from plastic beverage containers as food additives. PLF argued, as did the plaintiff corporations, that particles unintentionally diffused from containers were not additives within the meaning of federal food and drug laws. The Monsanto Fund, the corporate foundation of Monsanto, contributed \$11,000 to PLF from 1979 to 1981.²⁵¹ The Lilly Endowment gave over \$30,000 to Pacific Legal Foundation in 1978, and again in 1980.²⁵² The Olin Corporation, another major chemical manufacturer and user, has been a consistent PLF funding source as well.

PLF also entered an action brought by the Shell Chemical Company and others for the registration of a chemical under the Federal Insecticide, Fungicide and Rodenticide Act; PLF represented a number of agricultural associations, several of which were PLF contributors.²⁵³ It entered another proceeding to oppose restrictions on use of chemical herbicides by the U.S. Forest Service.²⁵⁴

Two last cases of this nature demonstrate the interconnections involved. In *National Agricultural Chemicals Association v. Romiger*,²⁵⁵ fifteen separate chemical manufacturers, represented by the largest law firm in

247. 469 F. Supp. 892 (E.D. Mich. 1979).

248. PLF intervened on behalf of two organizations—the Southern Oregon Resource Alliance and the Oregon Women for Timber. *Id.* at 894.

249. See PLF, 1981 ANNUAL REPORT.

250. 613 F.2d 947 (D.C. Cir. 1979).

251. Colwell Report, *supra* note 171, at Table I. Monsanto also contributed \$30,000 to the Great Plains firm in that same period, and another \$12,500 to the National Legal Center for the Public Interest. *Id.* A Monsanto executive is a member of the Board of Directors of the Great Plains Legal Foundation and a client of a private law firm represented on the Mountain States Legal Foundation Litigation Committee.

252. *Id.*

253. Motion for Leave to File Brief Amicus Curiae and Brief Amicus Curiae in Support of Registrants on Behalf of Pacific Legal Foundation, Agricultural Council of Cal., Cal. Grain and Feed Ass'n, Cal. Cattlemen's Ass'n, and League of Cal. Milk Producers (EPA, filed Sept. 16, 1974).

254. *People for Envtl. Progress v. Leisz*, 373 F. Supp. 589 (C.D. Cal. 1974).

255. 15 Env't Rep. Cas. (BNA) 1039 (E.D. Cal. 1980).

San Francisco, sued to contest regulations imposed by the California Department of Food and Agriculture. PLF appeared in their support. A former PLF trustee is a leading partner of the San Francisco firm. PLF and the firm joined forces again when the Natural Resources Defense Council brought suit against three private lumber companies on the grounds that their harvest practices were damaging Redwoods National Park.²⁵⁶ The California Department of Forestry intervened as co-defendant, represented by PLF.²⁵⁷ One of the three private parties on PLF's side in this case was the Simpson Timber Company, whose manager was then a PLF trustee. Defending Simpson in the lawsuit, in tandem with PLF, was the same San Francisco law firm, also represented at that time by a partner serving as trustee, vice chairman, and assistant secretary on PLF's board.

3. *Land Use and Clean Air Legislation*

The California Coastal Commission was established in 1976 under the California Coastal Act,²⁵⁸ the culmination of a five-year planning process for the development of the California coastline.²⁵⁹ PLF has since appeared in at least seven lawsuits to challenge the Commission's requirements as unauthorized or unconstitutional, usually on behalf of private landowners.²⁶⁰ The most recent case, *Pacific Legal Foundation v. California Coastal Commission*,²⁶¹ illustrates the nature of the issues and representation.

The case presented a consolidated appeal of two cases to the California Supreme Court: one "filed by [PLF] and a group of coastal property owners" to invalidate Commission guidelines requiring easements for public access in connection with certain development, and the second filed by two property owners to invalidate a specific access requirement for their lands.²⁶² PLF undertook to represent all parties on appeal.²⁶³ By the time the case reached the Supreme Court, the Commission had abandoned its position on the substantive issues, and the only issue remaining from the specific-access action was eligibility for attorneys fees. Applying the Cali-

256. *NRDC v. Moran* (unreported) (discussed in *Pacific Legal Foundation*, Supplement to First Annual Report 4 (Aug. 28, 1974)) (on file with author).

257. The California Attorney General's Office, interpreting the law differently from the State forestry agency, declined to represent the agency. Weinstein, *supra* note 186, at 42.

258. CAL. PUB. RES. CODE §§ 30000-30900 (West 1977).

259. The 1972 California Coastal Zone Conservation Act, CAL. PUB. RES. CODE §§ 27000-27650 (West 1977), created a predecessor Commission to develop a coastal plan that was subsequently adopted in the current law.

260. Coastal Commission cases identified include *Randall v. CCC*, *CCC v. Trindle*, *Coastal Lutheran Church v. CCC*, *Consiglio v. CCC*, *Plechner v. CCC*, *City of Chula Vista v. CCC*, and *PLF v. CCC*. These cases are described in PLF, *NINTH ANN. REP.* 1981-1982, at 3; PLF, *The Reporter*, Sept. 1982, at 2.

261. 18 *Env't Rep. Cas.* (BNA) 1856 (Cal. 1982).

262. *Id.* at 1858.

263. *Id.* at 1859.

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ifornia Civil Code to the fees question, the Court found it “plain that the grant of administrative mandamus under the limited factual circumstances shown here did not result in conferring a ‘significant benefit’ on a ‘large class of persons.’ The decision vindicated only the rights of the owners of a single parcel of property.”²⁶⁴ On the guidelines suit, the Court similarly noted: “Here also, plaintiffs’ claim of injury depends for its urgency on the supposition that some of them will in the future desire to make improvements on their land requiring a permit from the Commission”²⁶⁵

The merits of these claims are of course not relevant this study. What is relevant is that, as the Court found, the claims were those of property owners in coastal California, not a notably impecunious class of individuals. Their injury related to restrictions on the further development of their properties, which would assume the financial means to undertake this additional development, and both the means and the incentive to seek private counsel.

In a similar case, PLF undertook the representation of the Marin Coalition, which sought the conversion of an abandoned federal air base to a private airport, as opposed to a public recreation area.²⁶⁶ The Coalition was comprised largely of the private owners of small aircraft. This is, again, a class of persons who could reasonably be presumed to have sufficient resources to retain counsel from the private bar.

Closer questions arise from PLF’s involvement in more than a dozen land use cases contesting the legality of local zoning ordinances and building permit requirements.²⁶⁷ The issues, sometimes constitutional, were almost identically presented by all parties opposing these measures. In *Construction Industry Association v. City of Petaluma*,²⁶⁸ PLF sided with developer plaintiffs in challenging a municipality’s attempt to control its growth through local zoning authority. As the PLF argument in this case

264. *Id.* at 1860.

265. *Id.* at 1865. The Court went on to conclude that the guidelines were sufficiently flexible so that no prediction of injury could be made. *Id.*

266. *Marin Coalition v. Freeman*, Civ. No. C-80-3133 (N.D. Cal. filed July 31, 1980).

267. See, e.g., *Construction Indus. Ass’n v. City of Petaluma*, 522 F.2d 897 (9th Cir. 1975), *cert. denied*, 424 U.S. 934 (1976); *M.J. Brock & Sons, Inc. v. City of Davis*, 401 F. Supp. 354 (N.D. Cal. 1975); *Arnel Dev. Co. v. City of Costa Mesa*, 28 Cal. 3d 511, 620 P.2d 565, 169 Cal. Rptr. 904, (1980); *Deltona Corp. v. United States*, 16 Env’t Rep. Cas. (BNA) 1482 (Ct. Cl. 1981); *Metromedia, Inc. v. City of San Diego*, 26 Cal. 3d 848, 610 P.2d 407, 164 Cal. Rptr. 510 (1980), *rev’d*, 453 U.S. 490 (1981); *Woodland Hills Residents Ass’n v. City Council*, 26 Cal. 3d 938, 609 P.2d 1029, 164 Cal. Rptr. 255 (1980); *Trent Meredith v. City of Oxnard*, 114 Cal. App. 3d 317, 170 Cal. Rptr. 685 (1981); *Groch v. City of Berkeley*, 178 Cal. App. 3d 518, 173 Cal. Rptr. 534 (1981); *Mills v. City of Trinity*, 108 Cal. App. 3d 656, 166 Cal. Rptr. 674 (1980); *Burger v. County of Mendocino*, 45 Cal. App. 3d 322, 119 Cal. Rptr. 568 (1975); *Graham v. Estuary Properties*, 399 So. 2d 1374 (Fla.), *cert. denied*, 454 U.S. 1083 (1981); *City of Boca Raton v. Boca Villas Corp.*, 371 So. 2d 154, (Fla. App. 1979), *cert. denied*, 449 U.S. 824 (1980); *City of Boca Raton v. Arvida Corp.*, 371 So. 2d 160 (Fla. App. 1979), *cert. denied*, 449 U.S. 824 (1980).

268. 522 F.2d 897 (9th Cir. 1975), *cert. denied*, 424 U.S. 934 (1976).

stressed the constitutional right to travel, a right not necessarily represented by its building trades allies, the entry, although debatable, was rated as valid.

For the great majority of these cases, however, PLF's interests and arguments focused simply on the additional burdens which the zoning restrictions and permit requirements would place on development. Thus in *Agins v. City of Tiberon*,²⁶⁹ a case involving the constitutionality of a local "open space ordinance," PLF's arguments against an "unconstitutional taking" were those of the plaintiff and of the Federal Savings and Loan Association, Half Moon Bay Property, Inc., and the National Association of Home Builders. These same commercial interests appeared in the *City of Boca Raton v. Boca Villas Corp.*²⁷⁰ and *City of Boca Raton v. Arvida Corp.*,²⁷¹ where, PLF's views were also presented by not only defendant corporations, but also the Florida Home Builder's Association and the National Association of Home Builders. In *Burger v. County of Mendocino*,²⁷² PLF intervened with the Pacific Holiday Lodge Co. to protect the rights of private property owners against the California Environmental Quality Act. In *Stoxa v. Santa Monica*,²⁷³ PLF was joined by the Brotherhood of Carpenters and Joiners and the Building Industry Association of California in opposing local requirements for low and moderate income housing. In *Graham v. Estuary Property Inc.*,²⁷⁴ arguing that the government should have the burden of proving a proposed wetland development harmful,²⁷⁵ PLF joined a galaxy of state and national developers.²⁷⁶

A related line of cases finds PLF supporting land development interests against federal and state clean air requirements. The firm has brought or entered at least eight lawsuits in California alone challenging the state's clean air program.²⁷⁷ In each case, PLF and associated municipalities, trade associations, and industries opposed regulation on the basis, inter alia, of their alleged impact on the State and local economy. In one such case, *Brown v. EPA*,²⁷⁸ the PLF argument against EPA requirements

269. 447 U.S. 255 (1980).

270. 371 So. 2d 160 (Fla. App. 1979), *cert. denied*, 449 U.S. 824 (1980).

271. 371 So. 2d 154 (Fla. Dist. 1979).

272. 45 Cal. App. 3d 322, 119 Cal. Rptr. 568 (1975).

273. 45 Cal. App. 3d 322, 119 Cal. Rptr. 568 (1975).

274. 399 So. 2d 1374 (Fla. Dist. 1981).

275. The opinion of the District Court begins: "Estuary Properties, Inc., owns almost 6,500 acres of land in Lee County on the Southwest Coast of Florida near Fort Meyers." *Id.* at 1376.

276. These interests included the plaintiff corporation, the Greater Miami Chamber of Commerce, the National Association of Manufacturers, Deltona Corp., the Florida Association of Realtors, the Florida Association of Home Builders, the National Association of Home Builders, the Florida Chamber of Commerce, and the Florida Phosphate Council.

277. *E.g.*, *PLF v. Costle*, 627 F.2d 917 (9th Cir. 1980); *City of Santa Rosa v. EPA*, 534 F.2d 150 (9th Cir. 1976); *Brown v. EPA*, 521 F.2d 827 (9th Cir. 1975); *Western Oil & Gas Ass'n v. California State Air Resources Board*, 129 Cal. App. 3d, 181 Cal. Rptr. 199 (1982).

278. 521 F.2d 827 (9th Cir. 1975).

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that states adopt certain clean air programs was at least facially independent of private interests in that suit and for this reason was rated valid. In another, a challenge to EPA regulations designed to discourage automobile use in non-attainment areas, PLF presented a constitutional argument based on the right to travel which, however strained, was sufficiently distinct from those of other parties to enable a valid rating. Two other cases²⁷⁹ raised the constitutionality of restrictions on new construction under the federal Clean Air Act; one was rated valid and the other questionable, as PLF was accompanied in the latter by similar arguments from J.C. Penney, Inc., Ernest W. Hahn, Inc., Texaco, and Chevron. In *Union Electric Co. v. EPA* and *Western Oil & Gas Association v. California State Air Resources Board*, the Foundation entered amicus briefs asserting an interest in economic development and arguing that the costs of clean air requirements imposed were so prohibitive as to invalidate the requirements themselves.²⁸⁰ The merits of these positions aside, the arguments were identical to those presented by both Union Electric and Appalachian Power in the first lawsuit, and to those of nine separate oil companies and two industry trade associations in the second.

4. *Issues of Minority Representation*

PLF has entered a more limited set of cases in support of contractors opposing requirements for minority representation in public contracts.²⁸¹ While the “reverse discrimination” claims raised in these cases are indisputably difficult and important issues of public policy and constitutional law, in at least two actions PLF undertook the direct representation of the construction industries themselves. PLF represented the Association of General Contractors and five private construction companies, for example, in their challenge to the federal Public Works Employment Act.²⁸² The Association was a founder of PLF, and has been a sustaining force for the development of other business PILFs as well. These ties aside, its financial means to conduct litigation on its own behalf, to say nothing of the means of the private companies, seems beyond question.²⁸³ Similarly, in

279. *PLF v. Costle*, 627 F.2d 917 (9th Cir. 1980); *Community Redevelopment Agency v. EPA*, 525 F.2d 1366 (9th Cir. 1975).

280. *Union Electric Co. v. EPA*, 427 U.S. 246 (1976) *Western Oil & Gas Assoc. v. California State Air Resources Bd.* 129 Cal. App. 3d, 181 Cal. Rptr. 199 (1982). In these cases, PLF filed amicus briefs asserting an interest in economic development, and arguing that the costs of the clean air requirements imposed were prohibitive.

281. See, e.g., *Association of Gen. Contractors v. Secretary of Commerce*, 459 F. Supp. 766 (C.D. Cal. 1978); *Department of Gen. Servs. v. Superior Ct.*, 147 Cal. Rptr. 422 (Cal. App. 1978).

282. *Association of Gen. Contractors v. Secretary of Commerce*, 459 F. Supp. 766 (C.D. Cal. 1978). The named plaintiffs also included Engineering Contractors Association; the American Subcontractors Association, Los Angeles County Chapter; the National Electrical Contractors Association; Steve P. Rados, Inc.; Griffith Company; Gordon H. Ball, Inc.; Stoddard Enterprises; and the Granite Construction Company.

283. Indeed, three counsel in the case are listed for PLF and one for the Associated General

Department of General Services v. Superior Court,²⁸⁴ PLF represented the Sacramento Builders Exchange, the National Electric Contractors Association, the Pittsburgh-Demoins Steel Co., the Ventura County Contractors Association, and the California State Builder's Exchange. The apparent ability of these groups to obtain private counsel aside, the State Building Exchange and the Construction Trades Council of California are significant PLF contributors.

From this summary, it can be seen that questions to PLF's litigation under the IRS standards for public interest law arise most frequently from its presentation of issues addressed fully and directly by some of the wealthiest corporations and corporate law firms in America. Many of these corporations and firms are also represented on PLF's board of trustees and its roster of major donors, giving rise to problems of insider benefit as well.²⁸⁵ This latter difficulty will remain pronounced for the other firms in this study.

D. *National Legal Center for the Public Interest*

Encouraged by the initial success of the Pacific Legal Foundation, J. Simon Fluor and other backers moved to reproduce business PILFs across the country.

In January 1975, PLF commissioned a study to determine "by empirical research" the best method of multiplying the effectiveness of firms devoted to "limited constitutional government, private property, the American free enterprise system and individual initiative and freedom with responsibility."²⁸⁶ The study was conducted by a San Diego industrial firm's corporate counsel, Leonard Theberg.²⁸⁷ In an early memorandum to PLF entitled "Expansion of the Pacific Legal Foundation Concept," Theberg explained that he had spent over three weeks on the road "meeting with PLF staff and directors, national business leaders, academic leaders, trade associations, lawyers, and many other individuals" to develop

Contractors of California.

284. *Department of Gen. Servs. v. Superior Ct.*, 147 Cal. Rptr. 422 (Cal. App. 1978).

285. The summary is not an exhaustive list of these potential "insider" problems. In *Committee for Humane Legislation v. Richardson*, 540 F.2d 1141 (1976), PLF filed an amicus brief supporting the American Tunaboat Association, the Tuna Research Foundation, the Fishermen's Union of America, and the United Cannery and Industrial Workers of the America to defend Department of Commerce regulations under the Marine Mammal Protection Act which allowed the continuing take (accidental killing) of porpoises in connection with the seining of tuna. PLF also filed an amicus brief in *United States v. Anderson Seafoods Inc.*, 447 F. Supp. 1151 (N.D. Fla. 1978), siding with various commercial seafood interests against the regulation of fish adulterated with mercury under Federal food and drug laws. The law firm of a PLF Trustee of long standing at the time lists the United States Tuna Foundation as a representative client.

286. NLCPI, A Prospectus: National Legal Center for the Public Interest, dedicated to a balanced view of the role of law in achieving economic and social progress (July 18, 1975) (attached to NLCPI, Application for Recognition of Exemption Under Section 501(c)(3)).

287. *Id.*

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options.²⁸⁸ He presented three models: a “branch model” enlarging PLF itself through regional offices; a “multi-regional approach” shifting PLF to a national coordinating body with separate but “interlocking” regional litigating offices; and—Theberg’s recommendation—an “umbrella model” creating a separate national coordinating entity for new PLFs in other regions.²⁸⁹ Leading priorities in the recommended “plan of action” were to obtain endorsement from the National Association of Manufacturers, the U.S. Chamber of Commerce and the U.S. Industrial Council, and to develop corporate fund raising.²⁹⁰ This was the plan adopted.

In 1975, the newly formed National Legal Center for the Public Interest (NLCPI) received tax exemption under section 501(c)(3). Its major purpose was to “assist in the establishment of independent regional litigation foundations dedicated to a balanced view of the role of law in achieving economic and social progress.”²⁹¹ NLCPI’s board of fifteen was comprised of executives of major corporations.²⁹² Leonard Theberg became its first president. “What we cannot accept,” Theberg offered as one of NLCPI’s first statements of philosophy, “are mindless proposals that would sacrifice the people of the United States on an altar of nature.”²⁹³

The NLCPI articles of incorporation state that it shall have no members and that all business is to be conducted by the board of directors. Chairmen of the NLCPI board have included Charles R. Barker, chairman and chief executive of ASARCO, Inc. and G. James Wilkins, financial vice president of the Dow Chemical Company. J.R. Fluor, nephew and successor to J. Simon Fluor, sits on the NLCPI board, as do Leslie M. Burgess, vice president of the Fluor Corporation, and representatives of Arthur Young and Co., the Fluor Corporation’s accounting firm. Other directors as of 1980 included representatives of ASARCO, Amway, the Nevada Chamber of Commerce, the U.S. Chamber of Commerce, the National Association of Manufacturers, ARMCO, Reserve Mining, Phillips Petroleum, United Telecommunications, Cincinnati Gas and Electric, Allis-Chalmers, and Republic Financial Services.

Initial funding for NLCPI came in substantial part from J. Simon

288. Draft Memorandum from L.J. Theberg to David L. James, Chairman, Pacific Legal Foundation 2 (undated).

289. *Id.* at 3-6.

290. *Id.* at 6-7.

291. NLCPI, Articles of Incorporation. In 1980, NLCPI announced Project Awareness, “designed to acquainted [sic] the public and leaders of the business community with the objectives and accomplishments of the seven associated public interest law centers.” National Legal Center News, Dec. 1980, at 1, col. 1.

292. Corporations represented included Dow Chemical, Dresser Industries, United Telecommunications, Garvey International, Adolph Coors Co. and ASARCO. NLCPI, *DIRECTORY OF LEGAL CENTERS* (1978).

293. B. Wood & T. Barry, Power Brokers in the Rockies: Privately-Minded in the Public Interest, NMPE Power Structure Report #11, 1980.

Fluor and a series of interests controlled by Richard Mellon Scaife.²⁹⁴ As important as foundation funding has been, sixty percent of the \$700,000 NLCPI budget in 1979 is reported to have been contributed by 330 private businesses, including the major chemical manufacturers, “the three major auto makers, such oil companies as Texaco, Exxon, Gulf and Mobil and a spread of other companies in fields as varied as steel and potatoes.”²⁹⁵ With this initial backing, NLCPI approached regions of the country through cooperating chambers of commerce and business organizations, setting up meetings on the clear and present dangers of public interest law and identifying local and regional leaders willing to sponsor a regional counterforce.

An illustrative meeting took place in Houston, Texas, in March 1980 under the auspices of “The Organization of Energy Consuming Citizens.”²⁹⁶ Conference speakers included James G. Watt, then President of the Mountain States Legal Foundation, which had been established two years earlier, L. Frank Pitts, owner of Pitts Oil Company, Reed Irvine, Chairman and founder of Accuracy in Media, and Milton Copulos, Director of Energy Studies at the Heritage Foundation.²⁹⁷ The conference brochure explained that:

The American people are being literally browbeaten by the news media, which has been censoring, omitting, and distorting the facts on energy. Important statements by members of Scientists and Engineers for Secure Energy (an organization which includes seven Nobel laureates) are ignored, while anti-energy pseudo scientists, with socialist credentials and false assertions, are quoted as if apostles of the Gospels. These people are busily working towards their goal of disorienting, demoralizing, demilitarizing and de-energizing our nation. And they are, thus far, succeeding. This condition must be reversed, or our nation will be destroyed.

Subjects covered would include “the government’s role in impeding energy development” and “interference by private persons and organizations with development and utilization of energy sources.” A subsequent section pointed the way to the solution: a program of “coordinated litigation

294. Rothmyer, *Citizen Scaife*, COLUM. JOURNALISM REV. July-Aug. 1981, at 41, 49. The Scaife Foundation and Scaife-controlled family trusts are reported to have contributed \$1.8 million to NLCPI and its affiliated business PILFs from 1973 to 1980, and an additional \$1.9 million directly to the Pacific Legal Foundation. *Id.* at 47.

295. *The Naderites of the Other Side*, N.Y. Times, Sept. 30, 1979, § 3, at 7, col. 1.

296. The Answer to OPEC is OECC, Organization of Energy Consuming Citizens: There is No Energy Crisis, There is only a Crisis of Access to Energy (undated) (announcing OECC conference at Hyatt Regency Hotel in Houston, Texas, Mar. 28-30, 1980) [hereinafter cited as OECC].

297. *Id.* Accuracy in Media (AIM) is a conservative, media-reform project and the Heritage Foundation is a conservative think tank in Washington, D.C.; both received significant funding from corporate foundations and the Scaife Foundation and trusts (AIM has received \$150,000 and the Heritage Foundation \$3.8 million from Scaife alone). Rothmyer, *supra* note 294, at 47.

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against government agencies, certain private groups and individuals.” The brochure promised:

[A] concrete and unique proposal will be presented to enable attendees to become participants in the development of our energy and other mineral resources on a free enterprise, profit seeking basis. The proposal will show how this can be achieved while thwarting the over-regulators and saboteurs masquerading as environmentalists.

THAT'S WHERE YOU COME IN!

This may well be the most important conference you were ever invited to attend.

On another level, Fluor and his associates looked to their own business connections for support for the regional firms. The Associated General Contractors of America, for example, “came on board”—“the first national organization to recognize the value of the regional litigating concept.”²⁹⁸ The Associated General Contractors led NLCPI to their 81,000 national members, “which in turn responded with additional encouragement and financial support.”²⁹⁹ The response from these businesses “had a snowball effect with their suppliers and industry allies, including labor, because labor is an integral part of the construction industry.”³⁰⁰

Through organization and fund raising efforts such as these, NLCPI generated the interest and support for five regional legal foundations and two more in Washington, D.C., each exempt from taxation as a public interest law firm. NLCPI then withdrew to a more passive role of coordination and support through publicity, conferences, newsletters, and general fundraising.³⁰¹ The litigating organizations and NLCPI remain in-

298. Fluor Memorial, *supra* note 193, at 3.

299. *Id.*

300. *Id.*

301. For a more jaundiced view of NLCPI's present level of assistance to its sponsored business PILFs, consider the following statement of Michael Horowitz, currently legal advisor to the Director of Office of Management and Budget:

Last year's meeting of the heads of the six NLCPI firms . . . held in Denver, degenerated into an extraordinary series of disputes regarding the effort of many firms to limit the ability of MSLF to seek funds in “their” regional territories. (At the time of the meeting, CLF was under its old leadership and immobilized by a then-sharply divided board). It was thus ironic that conservative public interest law firms, presumably committed to competition as an underlying value, sought to use their umbrella entity to limit competition for funds, to limit the growth and success of the most successful firm and, indeed, to compel that firm to effectively subsidize their operations. Were anti-trust laws applicable to the operations of the NLCPI, its Denver meeting would have constituted a *prima facie*, criminally unlawful conspiracy to distribute territories, punish efficiency and restrain competition. (The policy “adopted” at the meeting, but happily now honored in the breach, was that any fund raising held within the geographic turf of a “sister” NLCPI firm required full notice to the latter firm, together with an opportunity on its part to be present during the fund raising appeal).

M. Horowitz, *The Public Interest Law Movement: An Analysis with Special Reference to the Role and Practice of Conservative Public Interest Law Firms* 49 (1980) (unpublished draft on file with

ter-connected, however. The chairman of the board of directors for the Great Plains, Mid-Atlantic, Mid-America and Mountain States Legal Foundations have all served on the board of NLCPI. Arthur Young and Company, prominent in the organization of the Pacific Legal Foundation,³⁰² also assisted in the creation of the Mountain States Legal Foundation.³⁰³ According to a representative for Mid-America, there is even something of an informal division of labor:

With some exceptions, conflicts concerning water and land rights tend to come to the Denver office, education to Philadelphia, regulatory agencies to Washington, farming to Kansas City, unionization to Atlanta, ecology to Atlanta, industry to Chicago.³⁰⁴

Each of these organizations mirrors the one we have just seen.

E. *Mountain States Legal Foundation*

The Mountain States Legal Foundation (MSLF) was incorporated in April 1977 by Joseph Coors of the Adolph Coors Co., Karl Eller of Combined Communications Corp., and Leonard Theberg of NLCPI. Underwritten initially by an NLCPI grant of \$58,000, within a year gross revenue exceeded \$250,000, and in 1981 revenue approached \$1,250,000.³⁰⁵ A 1978 MSLF grant application shows that it had received contributions of \$500 or more from 175 corporations within its first year.³⁰⁶ These contributions were supplemented by grants from corporate foundations, including Coors, Phillips Petroleum, Amoco, Cities Service, and Marathon Oil.³⁰⁷

As with Pacific Legal and NLCPI, the funding behind MSLF reflects the mission. According to an NLCPI fund raising brochure for the firm, MSLF was born in response to an environmental movement that was "becoming an exercise in ideological fanaticism"; it was a "desperately needed counterforce to those pursuing narrow-interest goals."³⁰⁸ As the

author, cited with permission) [hereinafter cited as Horowitz Report].

302. PLF, having spawned NLCPI, has not formally joined it.

303. The MSLF application to the IRS for recognition as a PILF lists a return address of "Bruce S. Fink, c/o Arthur Young and Co., 1670 Broadway, Denver, Colorado."

304. Leroux, *Conservative Voice in Chicago*, Chicago Tribune, Mar. 10, 1981, § 2, at 6.

305. Blodgett, *supra* note 196, at 74 (reporting MSLF budget for 1982-83 at \$1.26 million).

306. Mountain States Legal Foundation, A Proposal for a Grant To provide General Operating Assistance to the Mountain States Legal Foundation for the Expansion of Its Educational, Legal Research and Litigating Activities in Defense of Our Free Private Institutions Private Rights, Private Freedoms, Private Enterprise 13-14 (Aug. 11, 1978) (grant proposal to the Rockefeller Family Fund) [hereinafter cited as Rockefeller Grant Proposal].

307. *Id.* The Scaife Foundation also provided "seed money," and an additional \$200,000 in 1980 alone. Rothmyer, *supra* note 294, at 41, 47.

308. Proposal for the Rocky Mountain Legal Foundation (RMLF) NLCPI, at 2 (undated) (on file with author).

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Foundation's first President, James Watt, described its interests, however, "We're not broad based, we're narrow based; we believe in the free enterprise system."³⁰⁹ The MSLF goals were, flatly, "the maintenance of our free market system" and "providing for responsible and sound economic growth."³¹⁰ Watt explained: "I fear that our states may be ravaged as a result of the actions of the environmentalists, the greatest threat to the ecology of the west."³¹¹ MSLF was "to counterbalance those groups that are trying to block the economic development of the west."³¹²

One may take the firm at its word. Government reports show one-half of the nation's coal reserves and the majority of its low-sulphur deposits in Colorado, Arizona, New Mexico, Wyoming, Montana, and the western Dakotas.³¹³ Over eighty-five percent of America's uranium reserves are in the same area, as are forty percent of domestic crude oil, twenty percent of the natural gas, most of the high-grade oil deposits, and most geothermal energy sites. Over 800 major energy-related projects are planned for the twenty-four states west of the Mississippi, almost 500 of them in the Rocky Mountain region. Colorado alone has 141 future energy projects in development. As the pursuit of energy resources stimulates the Rocky Mountain region, it stimulates the MSLF as well:

Mountain States Legal Foundation scored a tremendous victory in successfully challenging the constitutionality of the Crude Oil Windfall Profit Tax. The decision will strongly benefit both the energy industry and taxpayers in general . . . Participating in the suit were oil and gas associations representing virtually every independent oil producer in the nation and the States of Texas and Louisiana³¹⁴

A look at the firm's boards of directors and litigation is also instructive. Overall management of MSLF is provided by its directors, currently numbering thirty-one, twenty-six of whom are presidents or chief execu-

309. Lindsey, *Business Interests Fighting Back on Regulation*, N.Y. Times, Feb. 12, 1978, at 28, col. 1.

310. Rockefeller Grant Proposal, *supra* note 306, at 9. The proposal went on to explain that corporate foundations had unfortunately not yet "demonstrated an interest in funding organizations, such as MSLF, which are fighting to preserve the very incentive and reward system that has allowed families and corporations to establish the foundations." *Id.* at 10.

311. Memorandum of D. Burwell, National Wildlife Federation, to Senate Energy and National Resource Committee Staff, at 9 (Jan. 5, 1981) (quoting James Watt in a 1978 Denver Post article) (unpublished, on file with author).

312. Lindsey, *supra* note 309. These statements of purpose offer some counterpoint to those actually provided to the Internal Revenue Service in MSLF's application for exemption as a public interest law firm. See Rev. Rul. 75-74, 1975-1 C.B. 152 (discussed *supra* note 162).

313. B. Wood & T. Barry, *supra* note 293, at 20. The information that follows is taken largely from this report.

314. Mountain States Legal Foundation (undated, received Dec. 9, 1982) (on file with author). MSLF's involvement in this case was as *amicus curiae* for the two states.

tive officers of western investment, mineral, and energy development corporations.³¹⁵ The board's executive members alone represent over one hundred and twenty separate corporations and subsidiaries active in the Rocky Mountain states, including by way of illustration: Atascosa Mining Co., Flatiron Sand and Gravel Co., Hercules Oil and Gas Co., Western Coal Co., Idaho Power Co., Morrison Knudsen Co. (Morrison Knudsen Forest Products Co. and Morrison Knudsen International Mining Co.)³¹⁶ and over a dozen banks, insurance businesses, chambers of commerce and boards of trade.³¹⁷

The Foundation has two classes of "membership" under its articles of incorporation: individuals and organizations. Qualification for an organization requires a "commitment to the purposes" of MSLF and to annual financial support.³¹⁸ Individual contributors of over \$1000 a year belong to MSLF's "Freedom Club." "Members" receive no voting privileges or other identified benefits, save reports on the firm's activities.

MSLF litigation is approved by a twenty-five member board of litigation, twenty-one of whom are partners in private firms and three of whom are in-house counsel to major corporations (Boise Cascade, Union Pacific, and Mountain Bell).³¹⁹ A sampling of corporations represented by the law firms found on the board of litigation includes: Amoco, Tenneco, ARCO, EXXON, Gulf Oil, Sinclair Oil, Humble Oil, Anaconda, Tuscon Gas and Electric, Montana Power and Northwest Bell.

Litigation is conducted both by MSLF staff and by outside counsel: "[I]t should be noted that a substantial amount of the legal work being done by the Foundation is by law firms retained to assist, with an understanding that substantial pro bono work is given to the Foundation."³²⁰ Under one such arrangement, apparently, Mountain States has reported paying one private law firm over \$35,000 in legal fees;³²¹ at the time of

315. The Board also includes two mining consultants, an attorney, a rancher, and two public officials, U.S. Senator Clifford Hansen and Congressman Wayne Aspinall.

316. Also represented on the board are Mountain Fuel Supply Co., Pacific Northwest Bell, Utah-Portland Cement Co., Southern Cross & Livestock, National Steel and Shipbuilding Co., Mountain States Telephone & Telegraph, and Columbia Pictures Communications.

317. A more complete list of corporations represented by MSLF's Board of Directors includes: Adolph Coors Co; American Farm Bureau Federation; Atascosa Mining Co.; Beneficial Life Insurance Co.; Casper Chamber of Commerce; U.S. Chamber of Commerce; Colorado Ass'n of Commerce & Industry; Day Mines Inc.; Denver & Rio Grande R.R.; Entrada Industries, Inc.; First Interstate Bank of Nevada; First National Bank & Trust of Wyoming; Flatiron Paving Co.; Fleischli Oil Co.; Hercules Oil & Gas Co.; Idaho Mining Assn.; Idaho Power Co.; Kennecott Corp.; Morrison Knudsen Forest Products Co., Inc.; Morrison Knudsen Int'l Mining Co.; New Mexico's Landman's Ass'n; Rinker Materials Co.; Rio Grande Industries; Southern Cross & Livestock; True Oil Co.; Utah-Portland Cement Co.; Western Investments; and the Wyoming Farm Bureau.

318. MOUNTAIN STATES LEGAL FOUNDATION, 1982-83 ANN. REP.

319. *Id.*

320. See Rockefeller Grant Proposal, *supra* note 306, at 3.

321. Mountain States Legal Foundation, Income Tax Return for 1980, Form 990, Part II, line 1.

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this arrangement, a senior partner of this firm was serving on MSLF's board of litigation.

With this support, MSLF has established a staff of twelve attorneys and fourteen additional personnel in its Denver offices. The firm has organized "executive committees" in each of the Rocky Mountain states—Arizona, Colorado, Idaho, Montana, Nevada, New Mexico, and Wyoming. Suggestions for litigation come from these committees and from contributors to the firm. An early MSLF letter to corporate prospects indicates the relationship between funding and MSLF involvement:

Thank you for attending the luncheon for the advancement of the Mountain States Legal Foundation

Since the MSLF will be a non-profit public-interest law firm, supported only by private donations, your participation will be vital to our success. We need this participation in two ways. First, we need tax-deductible contributions to establish an experienced and dedicated legal staff; and, secondly, we need input from you and your Company regarding areas in which litigation would be of benefit to the broad public interest.³²²

MSLF has the second largest docket of the business PILFs, and the largest of the NLCPI firms.³²³ The evaluations were:

TABLE 2
MOUNTAIN STATES LEGAL FOUNDATION

	Party/ Intervenor	Amicus	Total
Valid	11	6	17
Invalid	31	10	41
Questionable	5	5	10

Of all the business PILFs examined, MSLF most clearly raised questions of insider profit. In at least twenty-four cases on the docket, the position MSLF was advocating directly benefited corporations represented on its board of directors, clients of firms represented in its board of litigation, or major contributors to MSLF's budget.³²⁴

An illustrative case concerned the sale of assets of the Mountain Fuel

322. Letter from Clifford L. Roek, Vice-President, Public Affairs, MSLF (undated).

323. An additional seven lawsuits were identified but insufficient information was available to evaluate them.

324. This statistic does not include those beneficiaries which were not identifiable as contributors, as corporate subsidiaries, or as clients; also unidentified were those investments of major banks or insurance companies which may have been at stake in the suit. This being so, the problem here is conservatively stated.

Supply Company at market price to its wholly-owned subsidiary, Wexpro Co., approved by the Utah Public Service Commission.³²⁵ Upon a challenge to that approval, Mountain Fuel, Wexpro, and Mountain Fuel shareholders intervened to uphold the price. MSLF appeared at their side as *amicus curiae* before the Supreme Court of Utah, and before the Supreme Court of the United States,³²⁶ to argue, as did the companies and shareholders, that a lower valuation would be an unconstitutional taking. Among those representing Mountain Fuel were two members of MSLF's board of litigation. Further, Mountain Fuel Supply was listed as an "over \$500 contributor" to MSLF at the time,³²⁷ while still other members of the litigation board listed Mountain Fuel as a client. To complete the circuit, the president and chairman of the board of the Mountain Fuel Supply Company also sat on the board of directors of MSLF. Although MSLF's argument in these proceedings was framed in constitutional terms,³²⁸ the case frankly concerned the valuation of corporate assets. The corporations whose assets were at stake and their counsel could not have been in a stronger position to influence MSLF's entry.

Mountain Fuel surfaces again in an appeal before the U.S. Forest Service involving oil and gas leases assigned to Wexpro, the Mountain Fuel subsidiary.³²⁹ MSLF represented Wexpro directly on this appeal. MSLF has also since appeared as *amicus* on the side of Mountain Fuel in another case before the Utah Public Service Commission.³³⁰ Merits aside, questions concerning the inside role of Mountain Fuel are inescapable.

MSLF's involvement in litigation for the City of Denver presents a more attenuated insider program. Litigation erupted in the late 1970's over construction of the Foothills Project, a reservoir to provide additional water to the city. The city filed a preemptive suit in Colorado seeking, somewhat innovatively, to enjoin opposition to the project.³³¹ Conservation organizations meanwhile filed suit in Washington, D.C., against federal defendants which had permitted the project.³³² The City of Denver did not appear in the Washington D.C. case, thereby preserving venue for its case in Colorado. Instead, MSLF intervened on behalf of the water users

325. *Committee of Consumer Serv. v. Public Serv. Comm'n*, 595 P.2d 871 (Utah 1979), *cert. denied*, 444 U.S. 1014 (1980).

326. *Brief Amicus Curiae of the Mountain States Legal Foundation in Support of Petition for Certiorari, Mountain Fuel Supply Co. v. Utah Comm. of Consumer Servs.*, *cert. denied*, 444 U.S. 1014 (1980) [hereinafter cited as *MSLF Amicus Brief*].

327. *Rockefeller Grant Proposal*, *supra* note 306, at 12.

328. *MSLF Amicus Brief*, *supra* note 326. ("The court's decision . . . takes private property without due process and just compensation and burdens interstate commerce," *id.* at 2).

329. *MSLF, Income Tax Return for 1980, Form 990, Schedule C*.

330. *Common Cause v. Utah Public Serv. Comm'n*, 598 P.2d 1312 (Utah 1979).

331. *City & County of Denver v. Andrus*, No. 77-W-306 (D. Colo. filed Mar. 28, 1977).

332. *National Wildlife Fed'n v. Andrus*, No. 78-1522 (D.D.C. 1980 filed Aug. 15, 1978).

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of the City of Denver and moved at once to dismiss the action for failure to join an indispensable party, the City of Denver.³³³ While maneuvers like this are standard legal fare, they seldom occur without concerted action. The City of Denver, for whom MSLF was acting in the D.C. proceedings, was represented in the Colorado action by an attorney who served on MSLF's board of litigation.³³⁴

MSLF actions on behalf of utilities offer another case in point. MSLF represented plaintiffs Montana Power, Puget Sound Power and Light, Portland Electric, and Washington Water, Power and Light in a challenge to EPA air quality regulations for power generating facilities.³³⁵ With the exception of Puget Sound, each of the utilities involved in the litigation is a contributor to MSLF; all are listed as clients of firms on MSLF's board of litigation. In a case against the Montana Public Service Commission, MSLF intervened on the side of Mountain States Telegraph and Telephone, the Northwest Mining Association, and the Montana Chamber of Commerce to oppose disclosure of certain utilities information.³³⁶ A board member of Mountain States Telegraph and Telephone sat on MSLF's board of directors; a member of MSLF's board of litigation listed Mountain States Telegraph and Telephone as a client.

MSLF has also been active in the controversy over utility "lifeline" or "essential need" rates, which make services available to elderly, disabled, and low-income individuals at a reduced price. At least two MSLF lawsuits and a ratemaking proceeding opposed the rates as inefficient and unlawful.³³⁷ The first case filed, *MSLF v. Colorado Public Utilities Commission*,³³⁸ affords a glimpse of the inurement and economic interest problems. In this case, MSLF apparently represented the Colorado Association of Commerce and Industry, People's Natural Gas, Kansas-

333. MSLF Motion to Intervene (filed Oct. 19, 1978) in *National Wildlife Fed'n v. Andrus*, No. 78-1522 (D.D.C. filed Aug 15, 1978).

334. In a more recent case, the City of Denver sued the Department of Agriculture to enjoin restrictions on rights of way for another water supply reservoir, Williams Fork. See *City & County of Denver v. Bergland*, 517 F. Supp. 155 (D. Colo. 1981). MSLF intervened on the side of the city and county to protect the interests of water users in future water supplies. Ignoring the fact that corporations represented on MSLF's board are among the Denver area's heaviest water users, a member of MSLF's board at the time of this action again listed both the City and County of Denver as a client. MSLF again came to the aid of the City of Denver in a challenge to requirements of the Department of Housing and Urban Development ("HUD") for competitive bidding by the City in HUD-aided projects. While these actions on behalf of the City are less bald than those for the Mountain Fuel Supply Company, the presence of both the City's law firm on MSLF's Board of Litigation and of corporate beneficiaries on both MSLF boards continues the "insider" pattern.

335. *Montana Power Co. v. EPA*, 429 F. Supp. 683 (D. Mont. 1977).

336. *Mountain States Tel. & Tel. v. Department of Public Serv. Reg.*, 634 P.2d 181 (Mont. 1981).

337. See *MSLF v. Public Utils. Comm'n*, 590 P.2d 495 (Colo. 1979); MSLF, *Income Tax Return for 1980*, Form 990 (listing *Utah Pub. Serv. Comm'n* and an administrative proceeding against the Idaho Public Utilities Commission).

338. 590 P.2d 495 (Colo. 1979).

Nebraska Natural Gas, Eastern Colorado Utility Co., Colorado Rural Electric Association, and Iowa Electric Light and Power.³³⁹ The financial interest of these groups is direct: Industrial users, as the largest consumers of electricity, carry the largest burden of below-cost lifeline rates. Higher industrial rates also lead to reduced consumption, which produces less utility revenue and depresses demand for fuel from suppliers such as plaintiffs People's Natural Gas and Kansas-Nebraska Natural Gas. A law firm represented on MSLF's litigation board lists the Colorado Rural Electric Association as a client; Kansas-Nebraska is a major contributor to MSLF.³⁴⁰

Perhaps MSLF's most extensive legal work has been directed towards opening federal lands to development. In a major case challenging Department of Interior restrictions on mineral activity in wilderness areas,³⁴¹ MSLF claimed to represent several of its "members" who, upon inquiry by the Court, surfaced as applicants for oil and gas leases. No reason appears why its lease-holding applicants/members were unable to obtain representation through the private bar. In *Utah Wilderness Committee v. Exxon*,³⁴² another challenge to mining in wilderness areas, MSLF's intervention on Exxon's behalf is colored by the fact that no less than six firms on its board of litigation list Exxon as a client. *Montana Wilderness Association v. United States Forest Service*,³⁴³ in which MSLF appeared as *amicus*, raised the issue of Burlington Northern's access to inholdings on public lands; Burlington Northern is listed as a major contributor to MSLF. The case of *State of Utah v. Andrus*,³⁴⁴ presented a similar question of access to unpatented mining claims in wilderness study areas. MSLF appeared as *amicus* for plaintiffs who included the Utah Mining Congress, the American Mining Congress, and the Independent Petroleum Association of the Mountain States. The Petroleum Association is listed as a major MSLF contributor. When a seismographic exploration company, CGG, appealed to the U.S. Forest Service for mineral access in

339. The assumption is made that MSLF represented these organizations because no attorneys are separately listed for them. Even were this not the case, the question of inurement would remain the same.

340. In a similar case, MSLF represented the Associated General Contractors of Wyoming in a proceeding against the Secretary of Commerce challenging minority hiring requirements. See MSLF, Income Tax Return for 1977, Form 990, Schedule 5, at 2 (discussing *Associated Gen. Contractors of Wyo. v. Secretary of Commerce*). While government involvement in minority hiring is unquestionably a valid subject for public debate and one affording an opportunity for PILF involvement from several perspectives, in this case the Associated General Contractors has long been a major contributor to MSLF. Again, dual questions of economic feasibility and inside benefit are raised.

341. PLF v. Watt, 18 Env't Rep. Cas. (BNA) 1266 (D. Mont. 1982).

342. Utah Wilderness Ass'n v. Exxon, Civ. No. C-81-0903A (D. Utah filed Dec. 9, 1981).

343. Montana Wilderness Ass'n, Nine Quarter Circle Ranch v. United States Forest Serv. 655 F.2d 951 (9th Cir. 1981).

344. Utah v. Andrus, 636 F.2d 276 (10th Cir. 1980).

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a wilderness study area,³⁴⁵ MSLF intervened on behalf of the Rocky Mountain Oil and Gas Association, another MSLF contributor.³⁴⁶

The pattern is repeated in other fields of energy development. The plaintiffs in *Kerr McGee v. NRC*³⁴⁷ were the Kerr McGee Corporation, a variety of uranium mining and milling companies, and the American Mining Congress; they, and MSLF as *amicus*, challenged the benefits and costs of NRC safety regulations. Kerr McGee is listed as a client of a member of MSLF's board of litigation, as is the Colorado Mining Association. MSLF also appeared as *amicus* on the side of Mobil Oil, Marathon Oil, and Amoco in their action to avoid taxes imposed by an Indian tribe;³⁴⁸ several firms on MSLF's litigation board list Mobil as a client. MSLF also appeared as *amicus* for the Independent Petroleum Association of the Mountain States and the Rocky Mountain Oil and Gas Association to challenge penalties derived from a mandatory duty to report pollution violations;³⁴⁹ both are major MSLF contributors. MSLF also participated recently in a challenge to the constitutionality of the windfall profits tax brought by the Independent Petroleum Association of America, claiming in its intervention (as co-counsel for the State of Louisiana and Texas) that the tax unlawfully seizes the property of a politically unpopular minority (i.e., oil interests).³⁵⁰ The merits aside, affiliates of the Independent Petroleum Association are major contributors to MSLF.

Two of the more difficult MSLF actions to evaluate for insider benefit were those challenging OSHA practices for safety inspections of private businesses. *Marshall v. Barlow's Inc.*, involved the need for a search warrant; *Stoddard Lumber v. Marshall* questioned OSHA procedures for scheduling investigations.³⁵¹ MSLF, in *amicus* appearances, advanced the

345. MSLF, Income Tax Return for 1980, Form 990, schedule 6 (discussing *CGG v. United States Forest Serv.*). MSLF entered several other cases to challenge access restrictions, a position which would benefit mineral developers but in which no identified developers appeared as parties. As a general rule, where the interests were so diffuse the participation was rated "valid." Where the ties became closer to identified companies directing or supporting MSLF, the ratings were "questionable" or, as in the *Exxon* case, "invalid."

346. *Id.*

347. *Kerr-McGee Nuclear Corp. v. Nuclear Regulatory Comm'n*, 673 F.2d 1124 (9th Cir. 1982) (withdrawn from bound edition).

348. *Amoco Prod. Co. v. Jicarilla Apache Tribe*, 449 U.S. 1008 (1980) (granting motion of MSLF to file as *amicus*).

349. *United States v. Ward*, 448 U.S. 242 (1980).

350. *Ptasynski v. United States*, 550 F. Supp. 549 (D. Wyo. 1982). An MSLF news release following a district court decision invalidating the tax explains that the suit, which will "strongly benefit the energy industry," was participated in by "oil and gas associations representing virtually every independent oil producer in the nation." MSLF's release closes "by calling on its friends and supporters so the fight for fair tax policy can continue unabated. Your tax-deductible contribution will assist the Foundation in this appeal, and in its other crucial cases." MSLF "Action Update," (undated, received, Dec. 9, 1982).

351. *Marshall v. Barlow's, Inc.*, 436 U.S. 307 (1978); *Stoddard Lumber Co. v. Marshall*, 627 F.2d 984 (9th Cir. 1980).

position of the two corporations. Also entering *amicus* appearances on Barlow's behalf were the U.S. Chamber of Commerce, the National Federation of Industry and Business, and the American Farm Bureau Federation. A member of MSLF's board is president of the American Farm Bureau Federation. Another sits on the of the U.S. Chamber of Commerce. A private practitioner in Boise, Idaho, represented Barlow, the business plaintiff in the first case. The same attorney also sat on MSLF's litigation board. A contemporaneous NLCPI newsletter reveals that MSLF entered the *Barlow's* case at the specific request of this attorney.³⁵² MSLF's federal income tax return for the following year indicates payment of more than \$35,000 in legal fees to the attorney's Boise firm.³⁵³

Of course, a number of MSLF cases raise no questions of insider inurement or economic stakes and stakeholders, and are of an unquestionably public interest character. Several other cases of probable benefit to MSLF "insiders" were rated valid because the potential connections were simply too tenuous.³⁵⁴ The discussion above, however, does illustrate a problem epitomized by MSLF: the benefit of influential persons within. Indeed, one way of understanding MSLF's otherwise rather random docket is to look not merely at economic interests of the region but at those very interests that provide the firm's direction and support. No small number of proceedings seem to have been selected simply in order to assist the ongoing litigation of corporate donors and clients. Harsh statements, but well within the record.

F. *Mid-America Legal Foundation*

The Mid-America Legal Foundation (Mid-Am) was among the first of the NLCPI offspring, incorporated in October 1975. Serving the seven midwestern states of Illinois, Indiana, Iowa, Michigan, Minnesota, Ohio, and Wisconsin, Mid-Am was "designed to appear in court to balance the one-sided views of so-called 'public interest' pressure groups."³⁵⁵ It would be "allied with other true public interest litigation foundations interested

352. National Legal Center News, NLCPI, Spring, 1977, at 1. See also MSLF Income Tax Return for 1978, Form 990, schedule 6, at 7; Letter from John Runft to MSLF members, "Comments From a Winner" (undated) (on file with author). The Form 990 informed the IRS that "Plaintiff's attorney requested MSLF to intervene," *id.*; no reference was made to this attorney's position on MSLF's litigation board. While this reporting demonstrates no impropriety, it does show the inadequacy of the information the IRS presently requires to reveal overlapping private and public interests, a subject later addressed in this study.

353. MSLF, Income Tax Return for 1980, Form 990, schedule A, pt. II.

354. *E.g.*, *Environmental Defense Fund v. Costle*, 657 F.2d 1210 (D.C. Cir. 1981) (EPA water quality standards for Colorado River). Similar cases, where the threads were a little more clear, were rated as "questionable." *E.g.*, *FERC v. Mississippi*, 456 U.S. 742 (1982) (challenging utility regulation under PURPA.)

355. Mid-America Legal Foundation Newsletter, Vol. 2, No. 2, Fall 1977.

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in preserving the free-enterprise system around the nation.”³⁵⁶ Contributions in the first year exceeded \$80,000.³⁵⁷ One year later, Mid-Am’s gross revenue had doubled, and by 1980 the firm reported contributions totalling \$261,685,³⁵⁸ most of which came from corporations and foundations. These revenues support a professional staff of four attorneys in Chicago.³⁵⁹

Overall direction of Mid-Am is provided by three officers and a sixteen-member board of directors. All three officers and thirteen members of the board are either presidents, chairmen, or chief executive officers of prominent mid-western manufacturing and industrial concerns, including General Motors, 3M, ARMCO, Franklin Electric, Freuhauf Corp., and Winnebago Industries.³⁶⁰ The Mid-Am board’s executive members alone represent more than forty separate corporations active in the mid-west³⁶¹ and over a dozen banks, finance corporations, insurance businesses, trade associations, and chambers of commerce.³⁶²

In addition to this board, Mid-Am also maintains a ten-member public affairs board, and a fifteen-member legal advisory board. The public affairs board is comprised of representatives from corporations from all states in the region.³⁶³ The legal advisory board consists of attorneys from prestigious mid-western law firms.³⁶⁴ Both groups recommend cases for Mid-Am involvement, although the board of directors makes the final decision.³⁶⁵

The most striking features of Mid-Am are its ties to two mid-western business associations—the Illinois Manufacturers’ Association (IMA) and the Chicago Association of Commerce and Industry (CAC&I). Both groups have a long history of involvement in business development. The IMA, founded in 1893, is the nation’s oldest and largest state industrial association. The association staffs its own lobbying committee in Springfield to promote pro-business legislation.³⁶⁶ In 1981, it contributed more than \$130,000 to pro-business political candidates through the Manufacturers’ Political Action Committee—an IMA affiliate. The President of

356. *Id.*

357. *See* Mid-America Legal Foundation, Income Tax Return for 1979, Form 990.

358. *See* Mid-America Legal Foundation, Income Tax Return for 1981, Form 990.

359. Interview with Madonna M. Shields, Director of Development, Mid-America Legal Foundation (Sept. 21, 1983).

360. News from Mid-America Legal Foundation, vol. 6, 1982.

361. *E.g.*, Hudson-Thompson, Inc., Krueger Metal Products, Inc., Mountain Fuel Reserves, Sundstrom Corp., Minnesota Mining & Manufacturing, Inc., ARA Services, Inc., Lennox Industries, Inc., Lincoln Finance Corp., Trane Co.

362. The Board of Directors also includes two attorneys in private practice and the president of a Michigan college.

363. *Id.*

364. *See* Shields Interview, *supra* note 359.

365. *Id.*

366. Illinois Manufacturing Assoc. 1981 ANN. REP. at 1.

Marblehead Lime Corporation is a director of both Mid-Am and IMA.³⁶⁷ The Borg-Warner Corporation is also represented on both the Mid-Am and IMA boards of directors, though not through the same individual.³⁶⁸ With IMA political and legislative services in place Mid-Am has become, to an extent which will be noted, IMA's legal services arm.

CAC&I has also played a strong role in representing regional commercial interests. Founded in 1904, the Association currently has a staff of more than sixty individuals and a membership of over 6500. It is organized into seventeen divisions and fifty-one committees specializing in commercial and industrial development, finance, governmental affairs, and taxation.³⁶⁹ Like IMA, CAC&I has overlapping links with Mid-Am. Officers from Inland Steel Company and FMC sit on its board, as they do on the board of Mid-Am. Perhaps more instructive, the chairman of Mid-Am served on the senior council of CAC&I.

Mid-Am's participation was noted in twenty-four lawsuits, evaluated as follows:

TABLE 3
MID-AMERICAN LEGAL FOUNDATION

	Party/ Intervenor	Amicus	Total
Valid	0	1	1
Invalid	4	9	13
Questionable	1	9	10

In five cases, Mid-Am provided direct legal representation for a corporate litigant. In still more, Mid-Am represented IMA and CAC&I. *Citizens for a Better Environment v. Costle*,³⁷⁰ for example, presented an environmental group's challenge to approved Clean Air Act programs in Illinois and Indiana. When EPA's original answer to the complaint threatened to affect their interests, steel companies within the region, including Jones and Laughlin, Republic Steel, United States Steel, Youngstown Sheet and Tube, and Interlake, intervened. The chairman and chief executive officer of Interlake was on Mid-Am's board at the time. Mid-Am soon intervened for the IMA.

Similarly, in *Natural Resources Defense Council v. EPA*³⁷¹ Mid-Am

367. *Id.* at 14.

368. *Id.*

369. CHICAGO FACES AND PLACES, Oct. 1979, at 4.

370. 515 F. Supp. 264 (N.D. Ill. 1981).

371. 683 F.2d 752 (3d Cir. 1982). Mid-Am maintained this action in *National Ass'n of Metal Finishers v. EPA*, 19 Env't Rep. Cas. (BNA) 1785 (3d Cir. 1983). In its challenge to the substance of the pretreatment regulations, Mid-Am, representing CAC&I, was joined by the Ford Motor Co., the

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intervened on behalf of both IMA and CAC&I to support EPA's postponement of an effective date for regulations on the discharge of toxic pollutants into publicly-owned treatment works. Several regional chemical concerns also intervened, including Union Carbide Corporation, American Cyanamid Company, the Chemical Manufacturers' Association, and FMC Corporation. Mid-America's legal argument was but a slightly different articulation of these corporations' first line of argument in the lawsuit.

In *Natural Resources Defense Council v. NRC*,³⁷² Mid-Am again intervened on behalf of IMA and CAC&I to argue that the Export-Import Bank (Eximbank) did not have to comply with the National Environmental Policy Act before acting upon a request for financial assistance. As found in the lawsuit, Eximbank has provided over \$20 billion in direct loans and financial guarantees to assist exports of equipment and products from American business corporations. Given the corporate interests directing Mid-Am, which hold an equally direct stake in the largesse of the Eximbank, the action would have been at least questionable. More telling here, however, was Mid-Am's additional representation of the Crosby Valve and Gauge Company. At this point any philosophical rationale for Mid-Am's intervention is overtaken by the economic interests of its clients.

In two other cases, Mid-Am filed *amicus* briefs on behalf of defendants charged with violations of federal securities laws. *Aaron v. SEC*³⁷³ found Mid-Am arguing that the commissioner was required to make a showing of *scienter*, and not mere negligence, to enjoin prospective violations of § 17(a) of the 1933 Securities Act and § 10(b) of the 1934 Act. Similarly, in *Investors Research Corp. v. SEC*,³⁷⁴ Mid-Am argued that to find "wilful" violations of § 17(c)(1) of the Investment Company Act of 1940, the SEC is required to prove that the actor knew or reasonably should have known that his conduct was illegal. The selection of such cases by a public interest law firm seems questionable; when one thinks of technical questions of defense against federal securities laws, private business interests more readily come to mind. That these interests are entitled to their day in court is beyond question. Whether they are entitled to a second layer of tax-exempt representation should require a different answer.

National Association of Manufacturers, the Chemical Manufacturer's Association, and Interlake Steel. *Id.* at 1792.

372. 647 F.2d 1345 (D.C. Cir. 1981).

373. 446 U.S. 680 (1980).

374. 628 F.2d 168 (D.C. Cir.), *cert. denied*, 449 U.S. 919 (1980).

G. *Gulf Coast and Great Plains Legal Foundation*

The Gulf Coast and Great Plains Legal Foundation ("GPLF") was incorporated in September 1976 as the "Great Plains Legal Foundation," with offices in Kansas City, Missouri. The firm's application to the IRS for recognition as a tax exempt public interest law firm describes its origins:

A group of businessmen in the central states area independently arrived at the conclusion that a public interest law firm was needed to serve that region. The National Legal Center for the Public Interest has assisted in the organization phase and it is anticipated that the organization will share information with NLCPI and similar organizations for mutual assistance.³⁷⁵

Not surprisingly, seven of the eight original directors were business executives of such corporations as Monsanto, Texas Commerce Bancshares, Montana-Dakota Utilities, Martin Tractor, Liberty Manufacturing Company of Texas, and Republic Financial Services.³⁷⁶ GPLF's current chairman is the chief executive of Republic Financial Service of Dallas and a past director of the U.S. Chamber of Commerce. Its vice-chairman (and former chairman) is a retired president of the U.S. Chamber.³⁷⁷ The firm is also assisted by two advisory boards in public affairs and legal affairs. The public affairs advisory committee includes representatives of Alcoa, Dow Chemical, Emerson Electric, United Telecommunications, EXXON, Northwestern Bell, Montana-Dakota Utilities, and Sears and Roebuck (two members).³⁷⁸ The legal advisory committee includes corporate counsel from Monsanto, Cities Service, Peabody Coal, Marion Laboratories and the LTV Corp.³⁷⁹

Fundraising was a matter of outreach through these corporations into the American heartland.³⁸⁰ Referring again to GPLF's application for exemption:

375. Great Plains Legal Foundation, Application for Recognition of Exemption under Section 501(c)(3) (Sept. 30, 1976).

376. The Board also includes such concerns as EXXON and United Energy Resources, Inc, and two GPLF staff attorneys *See* GPLF News, Fall 1980, at 4. The degree to which these staff members participate in litigation decisions in this capacity is unknown. Service guidelines require litigation decisions to be made by Boards of Directors independent of staff. Rev. Proc. 71-39 § 3.05, 1971-2 C.B. 575, 576.

377. *See supra* note 213.

378. GREAT PLAINS LEGAL FOUNDATION, DIRECTORY OF LEGAL FOUNDATIONS 6 (1980). There are no women on GPLF's public affairs committee nor, with the exception just noted, on any of its Boards. Indeed there were no women identified on any Board of Directors, Litigation or Public Affairs Committees of any business PILF in this study.

379. It also includes six attorneys in private practice, five law school deans and professors, and one judge.

380. GPLF's original declared territory included Arkansas, Kansas, Louisiana, Nebraska, North Dakota, Oklahoma, and South Dakota. *Id.* at 1.

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To date, the organization's fund-raising activities have been limited to the personal solicitation and indications of support by officers and directors of the organization throughout the Central States area, including primarily, North Dakota, South Dakota, Nebraska, Kansas, Missouri, Oklahoma, Louisiana and Texas.³⁸¹

In 1977, its first full year of operation, the firm reported \$303,500 in receipts; in 1981 it reached a high of \$431,160.³⁸² These revenues reflect substantial corporate donations. Of \$289,000 received in 1978, \$149,000 came from seven corporations and corporate foundations (e.g., EXXON, Monsanto, the Olin Foundation, the Texas Education Association), none at less than \$15,000.³⁸³ These moneys have supported at least three staff attorneys and several administrative personnel.

As GPLF has grown financially, it has sought to grow geographically as well. One initiative was to change its name to the Gulf Coast and Great Plains Legal Foundation, to symbolize an interest in the South-Central states.³⁸⁴ GPLF then conducted negotiations with the Mountain States Legal Foundation, proposing a merger in 1981.³⁸⁵ When these discussions failed, GPLF announced a merger the following year with the "Legal Foundation of America," described as a Texas firm with a track record in cases ranging "from energy to criminal justice."³⁸⁶ GPLF's June 1982 newsletter identified twenty-eight cases in which the Legal Foundation of America was then involved. From the descriptions offered, six actions supported utilities in regulatory and ratemaking cases (e.g., Northern Utilities, Inc., Kansas Power & Light, Oklahoma Gas and Electric), another six supported such commercial concerns "opposing confiscatory taxation" (on behalf of the Superior Oil Co.) and "opposing unreasonable 'usury laws'" (on behalf of Republic Bank),³⁸⁷ and three more supported businesses involved in labor management disputes. This merger invests GPLF with an office in Houston, Texas, at least one additional staff attorney (as executive vice-president),³⁸⁸ and another new name: the "Gulf and Great Plains Legal Foundation of America."

381. *See id.* at 1.

382. Great Plains Legal Foundation Income Tax Return for 1981, Form 990. GPLF appears to compensate its personnel with some generosity: its President at \$69,000 in 1981, and a second attorney at \$46,000, exclusive of other employee benefits and contributions.

383. GPLF Income Tax Return for 1979, Form 990 (attachments F, F-1).

384. Gulf Coast and Great Plains Legal Foundation News, Sept. 1981, at 1 ("Our name has been changed to more accurately reflect the nine states the Foundation serves.").

385. Minutes, Great Plains Legal Foundation Meeting of the Board of Directors (Feb. 13, 1981) (on file with author).

386. *Merger Strengthens Foundation Position*, Gulf Coast and Great Plains Legal Foundation News, June 1982. No independent research on Legal Foundation of America cases was conducted in the course of this study.

387. It is perhaps a coincidence the Republic National Bank of Dallas is listed as a representative client of the law firm of a member of GPLF's Board of Directors.

388. The Legal Foundation of America was apparently served by two counsel, husband and wife,

The purpose of this organization and funding is of course the practice of law, the objectives of which are stated broadly in GPLF's Articles of Incorporation: "To provide legal representation and to assist other organizations in providing legal representation for the citizens of the United States, corporate or individual, in matters of public interest at all levels of the judicial process."³⁸⁹ The exact nature of this representation, "corporate or individual," is reflected in GPLF's "Mission Statement," which notes that government action "may unnecessarily infringe upon the rights of individuals and thwart sound economic growth."³⁹⁰ A subsequent GPLF brochure categorizes its legal activities under the following headings: energy ("Will federal regulations and court decrees prevent our country from developing energy resources sufficient to meet our needs in the next decade?"), business regulation ("OSHA"), agriculture ("impossible pesticide regulations"), land use, academic freedom, and individual remedies.³⁹¹

GPLF cases were evaluated as follows:³⁹²

TABLE 4
GREAT PLAINS LEGAL FOUNDATION

	Party/ Intervenor	Amicus	Total
Valid	6	7	13
Invalid	7	6	13
Questionable	1	3	4

Typical of a line of GPLF cases is its representation of the St. Louis Regional Commerce and Growth Association—an organization claiming over 3000 corporations and individuals as members—in a 1979 challenge by the American Petroleum Institute (API) to EPA air quality standards for ozone.³⁹³ Also parties to the case were DuPont and the Chemical Manufacturers Association. Although DuPont and the Chemical Manufacturers Association are not directly represented on GPLF's board, Monsanto provided a founding director, Dow Chemical was represented in

in Houston, Texas.

389. Great Plains Legal Foundation, Art. of Incorporation, art. V (Sept. 14, 1976).

390. Great Plains Legal Foundation, Income Tax Return for 1981, Form 990.

391. GPLF, "In the Courts . . . Challenging ever increasing government regulation and red tape" (undated brochure on file with author).

392. This study was unable to locate four GPLF cases through any reporting system. Efforts to obtain GPLF assistance in locating these cases were unavailing. GPLF newsletters refer to the cases as *Raun v. Andrus*, *USA v. City of Springfield*, *Missouri Congress of PTAs v. U.S. Postal Service*, and *Oxley v. Oklahoma Gas & Elec.* Because no independent check could be made on the nature of these cases or of GPLF's involvement in them, no ratings were attempted.

393. *American Petroleum Inst. v. Costle*, 609 F.2d 20 (D.C. Cir. 1979).

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GPLF's public affairs committee, and Monsanto appeared again on the legal advisory committee.³⁹⁴ The Olin Foundation was a major contributor.³⁹⁵ GPLF's incoming president in the spring of 1980 had been counsel to Monsanto and Marion Laboratories of Kansas City.³⁹⁶ The number and inside positions of these chemical corporations, which had a financial stake in the outcome of the proceedings, raise unavoidable questions of insider benefit.³⁹⁷

GPLF has sided with utility intervenors arguing that EPA new source performance standards were too strict. In *Sierra Club v. Costle*,³⁹⁸ GPLF represented the Missouri Association of Municipal Utilities, composed of more than forty-four urban electrical utilities.³⁹⁹ The Montana-Dakota Utilities Company is represented on GPLF's board. GPLF's brief in another case supported a challenge to EPA water discharge standards by the Consolidated Coal Company and the National Crushed Stone Association.⁴⁰⁰ The Peabody Coal Company is found on GPLF's board, as is EXXON, a major coal producer; other coal companies are listed as represented by private firms on GPLF's board and legal committee. GPLF also sided with oil interests in a proceeding opposing the Windfall Profit Tax, and with the nuclear power industry in another.⁴⁰¹ Among oil corporations that are on GPLF's board or committees or are member-clients are Exxon, Cities Service, Occidental, American Liberty Oil, Westland Oil Development, Ruby Exploration, Linger Petroleum, Montgomery Exploration, Plumb Oil, Wainoco Oil, Crystal Oil, Ashland Oil, ARCO, Continental Oil, Phillips Petroleum and Texaco; also represented are primary manufacturers and suppliers for nuclear plants, Westinghouse and General Electric.

GPLF is not unaware of the public relations impact of the insider-industries on its board. In a board meeting on February 13, 1981, legal

394. See GPLF, Income Tax Return for 1981, Form 1023; GPLF, 1982 ANN. REP. 16; NLCPI, Directory of Legal Foundations (June 1980).

395. See GPLF, Income Tax Return for Form 990 (attachments F, F-1) (listing Olin as contributing \$10,000 in 1976 and in 1977).

396. National Legal Center News, Spring 1980.

397. Other cases illustrate GPLF's nexus to the chemical industry. For example, it entered EPA cancellation hearings for the pesticide 2-4-5-T, on behalf of Arkansas and Louisiana rice and seed growers associations. GPLF Legal Found. News, Sept. 1981, at 3. GPLF apparently followed this initiative with a "model brief" challenging the regulation of pesticides and herbicides. *Id.* GPLF also appeared before the National Academy of Sciences Food Safety Policy hearings in favor of the continued use of nitrites as a food preservative.

398. 657 F.2d 298 (D.C. Cir. 1981); see GPLF, Income Tax Return for 1980, Form 990, attachment E (explaining GPLF position).

399. GPLF, 1982 ANN. REP.

400. National Legal Center News, Spring 1980, at 2 (announcing intention to file amicus brief in *EPA v. National Crushed Stone Ass'n*, 449 U.S. 64 (1980)).

401. See GPLF, 1982 ANN. REP. 8 (describing involvement in *Hollis v. United States*, No. 82-56-C (W.D. Okla.), challenging constitutionality of Crude Oil Windfall Profit Tax Act of 1980); *Brief filed in Wolf Creek Nuclear Plant Construction Case*, GPLF News, Oct. 1978, at 1.

action was approved to defend construction of a General Motors plant in Kansas City, Kansas.⁴⁰² The authorization was conditioned, however, "on assurances that steps would be taken to guard against erroneous public inferences which may arise out of participation on the same side as General Motors."⁴⁰³ The "public inferences," not the participation, seem to have been the concern. Although no statement on this point was recorded, a founding member of GPLF's board of directors lists General Motors as a representative client of his law firm in Kansas City.⁴⁰⁴

H. *Mid-Atlantic Legal Foundation*

In 1977, NLCPI formed the Mid-Atlantic Legal Foundation (MATLF) in Philadelphia, where it was to represent "traditional American values . . . at all levels of judicial and administrative proceedings," especially those in six east-coast states.⁴⁰⁵ MATLF identifies these values more precisely in its literature as "free enterprise, private rights, sound economic development and individual liberties."⁴⁰⁶ MATLF's position was to be frankly pro-business:

Ask yourselves why private rights, the free enterprise system and sound economic development in this country are in jeopardy. It's a question worth your considering. Even if you work for government, your job depends on it. Nader's groups, the Natural Resources Defense Council, Public Citizen Litigation Group and the like have had a ball this past decade in knocking business and our enterprise economy. Regardless of the circumstances, the favorite target of the activists or extremists always seems to be the American business system and our free enterprise institutions. The favorite target of the anti-business zealots are the leaders of the private sector—because the activists simply don't believe in either the private sector or in a free economy.⁴⁰⁷

402. See GPLF, Income Tax Return for 1981, *supra* note 382.

403. The authorization was further conditioned upon a finding that GPLF's interests "would not otherwise be represented." *Id.*

404. The remainder of GPLF's docket displays a range of subject matter from reverse discrimination to federal regulation of advertising directed at children. In most of these cases, the economic interests, while never absent—food producers and manufacturers for example, no small economic interest in the central states, share an interest in the regulation of television advertising of food products for children—appeared sufficiently secondary to rate as valid. In *Donavan v. Baldwin Metals Co.*, 642 F.2d 768 (5th Cir. 1978), however, a case involving the need for search warrants for OSHA inspection of business places, GPLF filed an amicus brief for the Frisco Engineering, Erection and Fabrication Co., a party whose private interest appeared dominant.

405. MATLF, *Defending Your Rights* 3 (undated pamphlet).

406. *Id.* at 3.

407. Trea, *Private Rights and Free Enterprise*; PENNSYLVANIA PUB. RELATIONS SOC'Y NEWSLETTER (Sept. 1979) (unpaginated reprint). Trea was formerly general manager of the Pennsylvania Newspaper Publishers Association.

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Initial funding for MATLF came from the Sun Company, Betz Laboratories, Ingersoll-Rand, the United States Steel Foundation, the Alcoa Foundation, NLCPI, and the Scaife Foundation.⁴⁰⁸ The budget has grown from \$125,000 in its first year to over \$340,000 in 1981.⁴⁰⁹ It supports a modest staff of two attorneys in Philadelphia and a third in New York City.

MATLF's board is composed of sixteen members, fourteen of whom are presidents, vice-presidents or chairmen of major business corporations with interests in, inter alia, coal, chemicals, electricity, computers, manufacturing, and insurance.⁴¹⁰ The general counsel for the mid-atlantic region of Sears is currently president of the Foundation. These men are described in MATLF's literature as providing "grassroots leadership" for the firm and its work.⁴¹¹

The firm is also assisted by a legal advisory council and a public affairs advisory council. The twenty-one legal advisors include the general and corporate counsel of sixteen separate corporations, among them Rockwell International, Consolidated Natural Gas, Lehigh Portland Cement, the American Iron and Steel Institute, and Merck and Company.⁴¹² The public affairs advisors, twelve in all, are characterized as "civic and business leaders from the Foundation's region," and include representatives of DuPont, Bethlehem Steel, United States Steel, and Alcoa.⁴¹³ Under its bylaws, MATLF has no members.⁴¹⁴

One-quarter of MATLF's actions supported the position of electric

408. The individual donations from these sources, in the first two years alone, ranged from \$7,500 to \$75,000. Other contributors at the outset included the Contractors Associations of Eastern and Western Pennsylvania, the Bethlehem Steel Corporation, General Electric, Sears, Roebuck & Co., PPG Industries, Tasty Baking Co., the Armstrong Cork Company, IR International Management Corp., and Kananee Industries, Inc. NLCPI, Progress Report No. 2: The Mid-Atlantic Legal Foundation, Feb. 24, 1977, at 2.

409. Corporate foundation contributions in 1981 included those of: U.S. Steel; Vulcan, Inc.; Rockwell International; Pittsburg National Bank; PPG Industries; H.J. Heinz Co.; Gulf Oil; and Alcoa. Directory of Pennsylvania Foundations (1981) (available at Free Library of Philadelphia).

410. A complete list of corporations represented on the Board includes: Armstrong Cork Co.; Philadelphia Electric Co.; Princess Susan Coal Co.; Utica National Insurance Group; Lawyers Co-operative Publishing Co.; National Legal Center for the Public Interest; Sperry Corp.; Jackson, Kelly, Holt & O'Farrell; Cyclops Corp.; Sears, Roebuck & Co.; General Elevator Co., Inc.; Ingersoll-Rand Corp.; Systems Manufacturing Corp.; Union Camp Corp.; and Hercules, Inc.

411. MATLF, *Defending Your Rights*, at 20 (undated).

412. A complete list of the corporations represented on this council follows: Merck & Co., Inc.; Bethlehem Steel Corp.; Middle Atlantic Lumbermen's Ass'n.; Suburban Propane Gas Corp.; Baltimore Gas & Electric Co.; Rochester & Pittsburgh Coal Co.; United Telephone System-Eastern Group; American Iron & Steel Institute; Smith-Kline Corp.; Lehigh Portland Cement Co.; Cyclops Corp.; Pennwalt Corp.; Thomas J. Lipton, Inc.; Consolidated Natural Gas Co.; Rockwell International; Carlisle Tire and Rubber Co. Three of the remaining five members are in private law practice; two are professors of law.

413. A complete list of corporations represented on the Public Affairs Advisory Board includes: Consolidated Natural Gas Co.; Thomas J. Lipton, Inc.; Rockwell International; Carlisle Tire & Rubber Co.; Columbia Gas Transmission Corp.; United States Steel Corp.; Gunn Public Relations, Inc.; Harsco Corp.; Bethlehem Steel Corp.; Gleason Works Co.; Aluminum Company of America.

414. MATLF's bylaws, as amended Feb. 26, 1981, make no provision for members.

utilities, an industry well-represented on its three boards. Over half of MATLF's entries were to contest the application of environmental laws to corporations and other private owners. The overall docket was evaluated as follows:

TABLE 5
MID-ATLANTIC LEGAL FOUNDATION

	Party/ Intervenor	Amicus	Total
Valid	3	2	5
Invalid	2	8	10
Questionable	3	2	5

As will be seen, this summary grants MATLF the benefit of some considerable doubts.

In *Consolidated Edison Co. v. Public Service Commission*⁴¹⁵ and *Central Hudson Gas and Electric v. Public Service Commission*,⁴¹⁶ MATLF filed *amicus* briefs on behalf of the plaintiff utilities to challenge a New York Public Service Commission regulation barring the inclusion in monthly bills of inserts discussing "controversial matters of public policy." Invoking both the due process clause and the First Amendment, MATLF argued that regulation violated the utilities' right of free speech. At the time of the litigation, the vice-president and general counsel of Philadelphia Electric Company sat on MATLF's board. At the same time, the associate general counsel for Baltimore Gas and Electric Company was a member of MATLF's legal advisory council. Another member of MATLF's legal advisory council was a partner in a Philadelphia law firm that specialized in the representation of public utilities.

In the same vein, MATLF actively participated in the defense of the Nine Mile Point nuclear station before the New York State Public Service Commission.⁴¹⁷ The Commission had ordered an independent economic audit of the project. During a public comment period on the audit, the state Consumer Protection Board questioned the project's economics. In subsequent hearing on the issue, MATLF represented the Business

415. 447 U.S. 530 (1980).

416. 447 U.S. 557 (1980).

417. Other MATLF appearances on behalf of utilities include *Aeschliman v. United States Nuclear Reg. Comm'n*, 547 F.2d 622 (D.C. Cir. 1976), *rev'd sub nom. Vermont Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519 (1978), *NRDC v. NRC*, 582 F.2d 166 (2d Cir. 1978). See MATLF, *Income Tax Return for 1978*, Form 990, Schedule A (listing participations). A third suit, *Allied Chem. Nuclear Prod., & General Atomic Co. v. Nuclear Regulatory Comm'n*, 598 F.2d 759 (3d Cir. 1979), found MATLF directly involved as plaintiff along with, *inter alia*, Westinghouse Electric Corporation, Allied General Nuclear Services, and the Capital Legal Foundation. MATLF Report, Winter, 1981, at 4.

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Council of New York State, the Chamber of Commerce of Oswego, and the Greater Syracuse Chamber of Commerce. Instructively, the chairman of MATLF's public affairs advisory council is a partner in a law firm which, in turn, is legal counsel for the Business Council of New York State.

Instances of insider benefits are not restricted to utility cases. In *Bichler v. Eli Lilly & Co.*,⁴¹⁸ a New York state court upheld a \$500,000 judgment entered against Eli Lilly & Company on behalf of the daughter of a mother who used the drug diethylstilbestrols (DES). MATLF filed a brief arguing that the imposition of market share liability in such a case could have "serious adverse effects" in future product liability litigation. MATLF's ties to the industry at issue seriously compromise its role. Lilly has been a generous donor to the business PILFs.⁴¹⁹ The vice president and general counsel for Warner-Lambert Company, a major pharmaceutical producer, sits on MATLF's legal advisory council, as do the vice-president, secretary, and general counsel for Smith-Kline Company, another pharmaceutical manufacturer. The chairman of MATLF's legal advisory council is corporate counsel for Merck & Co., yet another major drug company.

MATLF also undertakes direct representation of private individuals. In *United States v. 51.9 Acres & Alan F. & Marian L. Felwig*,⁴²⁰ and *United States v. 13.26 Acres & Charles C. Evans, Jr., & Vicki L. Evans*,⁴²¹ the firm represented two landowners in their challenge to the government's condemnation of property that each had purchased for retirement along the Pennsylvania Appalachian Trail. The Department of Interior sought to acquire the properties to protect the scenic hiking trail; MATLF intervened to allege that the Department had failed to negotiate with the individual land owners in good faith. In *Houssons, Inc. v. Secretary of Interior*,⁴²² MATLF provided similar representation for two landowners who challenged the New Jersey pinelands management plan. The landowners claimed that the land-use restrictions involved would devalue their property to the point that they constituted a "taking" of private property. In all three cases, MATLF's participation was rated questionable—not invalid—since it is possible, although not likely, that the litigants lacked the financial means to pursue their claims.

In *Twin Coast Newspaper v. Department of Commerce*,⁴²³ however, MATLF intervened directly on behalf of American Lumber Interna-

418. 55 N.Y.2d 571, 436 N.E.2d 182, 450 N.Y.S. 2d 776 (1982).

419. See MATLF, Income Tax Return for 1981, Form 990. See also *supra* p. 1469.

420. See MATLF Report, Spring 1981, at 1 (listing participations). The cases are unreported.

421. *Id.*

422. 711 F.2d 1208 (3d Cir. 1983).

423. Citation unavailable, referred to in MATLF Report, Spring 1981, at 1.

tional, contending that shippers' export declarations should be considered confidential because American Lumber would suffer from the disclosure. Ostensibly, MATLF was protecting "small business enterprises"; in fact, it was providing free legal representation for a private company. Coincidence or no, a member of MATLF's legal advisory council is a member of the enterprise involved, the Mid-Atlantic Lumbermen's Association. In a similar venture, MATLF negotiated with the Pennsylvania Compensation Rating Bureau for the reclassification of lumberyard employees into two groups, thereby reducing the insurance premiums that employers must pay.⁴²⁴ Again, MATLF provided the legal work for an industry—again, one that happened to be represented by a member of its Board.⁴²⁵

I. *Southeastern Legal Foundation*

In the fall of 1975, Leonard Theberg travelled to Atlanta to organize the Southeastern Legal Foundation (SELF). At a meeting hosted by the West Lumber Company, "a group of businessmen in Atlanta arrived at the conclusion that a public interest law firm was needed."⁴²⁶ "The need," explained an early SELF newsletter, "for debate and philosophical discussion is now secondary to the need for action designed to result in policies of government which will permit the strength of a market oriented economy . . . to reassert itself."⁴²⁷

According to SELF's articles of incorporation, it is "[t]o provide and to assist in legal representation for the citizens of the United States of America, corporate or individual, on matters of public interest at all levels of the administrative and judicial process on a non fee basis."⁴²⁸ Behind this statement were some now-familiar impulses: "well-meaning activists" have "so impeded the development of our economy and our energy resources that our nation's health and future are threatened."⁴²⁹ In keeping with its rather unabashed business orientation, SELF announced one of

424. *Id.*

425. *See also* Marple & Radnor Townships v. United States Secretary of Transp. & Penn. Secretary of Transp., Civ. No. 81-46-27 (E.D. Pa., filed Nov. 12, 1981). MATLF served as counsel for a group of 14 parties, who intervened to secure completion of the Mid-County Expressway (I-476—"the Blue Route") in Pennsylvania. The group included the Delaware County Local Government, the city of Chester, individual taxpayers of Marple and Randon, United States Congressman Robert Edgar, the AFL-CIO council of Delaware County, the Chester Group (a business and financial consortium), and the Delaware County Chamber of Commerce. At least the last two groups are parties whose representation by MATLF is questionable; neither is a public charity, and both have at their disposal the apparent means to obtain representation from the commercial bar. The direct representation of § 501(c)(6) chambers of commerce and business associations is a phenomenon this study has discovered to be common with other business PILFs, the Mid-America and New England firms prominent among them.

426. SELF Tax Form 1023, Feb. 12, 1976, at 3 (attachment VI, question 5).

427. SELF Newsletter, June 1976, at 2-3.

428. SELF Articles of Incorporation, art. 3(b) (Feb. 11, 1976) (emphasis added).

429. *Message from the President and Chairmen of the Board*, SELF, THIRD ANN. REP. 1 (1979).

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its early initiatives in the following fashion: "The Birmingham Chamber of Commerce and the Southeastern Legal Foundation will present a seminar on what you can do to combat the increasing government regulation of your business."⁴³⁰ One thing you could do, of course, was to contribute SELF.⁴³¹

The firm's initial moneys were raised by the NLCPI, reported as \$17,500 in 1975.⁴³² Two years later, SELF had received donations from eight private foundations, including those of United States Steel and United States Sugar, and from sixty-five of the largest oil, chemical, banking, lumber, construction, retail merchandise, and utility enterprises in the South.⁴³³ In 1977, contributions totalled \$296,000.⁴³⁴ In 1980, the sum had risen to \$419,000,⁴³⁵ and in 1981, to over \$500,000.⁴³⁶ The donations "ranged from \$25 to 25,000"⁴³⁷ and, concluded *Business Atlanta* in 1981, the Foundation "has had little difficulty in raising money."⁴³⁸ Indeed, the article reported, in the previous year "free enterprise defenders garnered about \$10 million of the \$60 million contributed to both conservative and liberal public interest firms, even though the older liberal organizations outnumbered them ten to one."⁴³⁹ SELF's president explained: "mostly we receive gifts from individuals who like the principles we stand for."⁴⁴⁰

These same interests have directed SELF from its beginnings. Its first board was composed of Theberg of NLCPI and the chief executive officers of several Atlanta-based firms.⁴⁴¹ A 1976 news release welcomed

430. SELF, Action Update, Nov. 1976, at 2.

431. On the subject of funding, SELF, in harmony with its associated business-sponsored public interest law firms, has strongly opposed government financing for public interest organizations. See SELF FOURTH ANN. REP. 1980; SELF IN ACTION: FINANCING THE LIBERAL LOBBY 4 (1980); Lauterbach, *Southeast Legal Foundation Snarls Liberal Red Tape*, BUS. ATLANTA, Dec. 1981 (on file with author); Legal Times of Wash., Feb. 5, 1970, at 26 (Letter to the editor from B. Blackburn, director, SELF. Expressing a fear that donees will not bite the hand that feeds them, SELF's president has explained that the firm prefers "to exist on the contributions of a broadly based public, rather than government." Blackburn letter, *supra*. Just how broad SELF's alternative base would be, and whether SELF would be willing to bite the hands of these sources in turn, was left unsaid.

432. SELF, Tax Return for 1975, Form 1023, at 5 (attachment V).

433. SELF, FIRST ANN. REP. (1977). Listed corporate contributors included: Alabama Assoc. Gen. Contractors; Alabama Gas; American Bus. Prods.; American Cast Iron Pipe; Atlanta Gas Light; Chevron, U.S.A.; Cooper Indus.; Deering-Milliken; Dow Chem.; Duke Power; Eli Lilly Int'l; Ethyl Corp.; Exxon; Florida Power & Light; Flowers Indus.; GM; Georgia Ass'n Realtors; Georgia Pac.; Gold Kist, Inc.; Gulf Oil; Irby Constr.; J.A. Jones Constr.; Kimberly Clark; S.S. Kresge; Mobil Oil; National Bank of Georgia; Pepsico; Redfern Food; R.J. Reynolds; Rohm & Haas; Royal Crown Cola; Sears Roebuck; Shell Oil; Southern Bell; South Carolina Electric & Gas; Southern Co.; Stauffer Chem.; Tenneco; Texas Transmission Gas; Textiles, Inc.; Union Oil; and Winn-Dixie Stores.

434. SELF Income Tax Return for 1981, Form 990, at 2 (question 11(d)).

435. *Id.* (question 11(a)).

436. Lauterbach, *supra*, note 430.

437. *Id.*

438. *Id.*

439. *Id.*

440. *Id.*

441. SELF Tax Form, 1023, Feb. 12, 1976, at 1 (attachment 1).

“three more tremendously successfully businessmen” to the board.⁴⁴² By 1981, the board had expanded to nineteen trustees with the addition of executives from, inter alia, Florida Power and Light, T.A. Jones Construction, United American Can, Gages Enterprises, and Linder Industrial Machine Company.⁴⁴³ Under this direction, SELF operates with a professional staff of four attorneys from offices in Atlanta, Georgia. Its self-described region includes the states of Alabama, Florida, Kentucky, Mississippi, North Carolina, South Carolina, Tennessee and Virginia.

The SELF docket was evaluated as follows:

TABLE 6
SOUTHEASTERN LEGAL FOUNDATION

	Party/ Intervenor	Amicus	Total
Valid	3	5	8
Invalid	2	3	5
Questionable	1	3	4

*Southern Appalachian Multiple Use Council v. Bergland*⁴⁴⁴ illustrates SELF's environmental action. SELF filed suit on behalf of commercial lumber and mining interests to challenge a federal decision to withdraw over 31,000 acres of U.S. forest from multiple uses while it was being studied for inclusion in the wilderness system.⁴⁴⁵ Several companies associated with SELF stood to gain from the maintenance of the multiple-use classification. The president of one such corporation, the West Lumber Company, served on the SELF's original board of trustees,⁴⁴⁶ and is a major contributor. Other donors with identifiable interests in the outcome of the litigation included the Georgia Pacific Company and four energy corporations. No less than seventeen potentially-interested companies are listed as clients of the private law firms associated with SELF's board of legal advisors.⁴⁴⁷

442. SELF, Action Update, Nov. 1976, at 1.

443. SELF, FIFTH ANN. REP. (1981).

444. 15 Env't Rep. Cas. (BNA) 2049, 11 Env't Rep. Cas. (BNA) 20679 (W.D.N.C. 1981).

445. Plaintiff South Appalachian Multiple Use Council included “representatives of the forest products industry, such as companies and individuals working in the lumber business,” 15 Env't Rep. Cas. (BNA) at 2050; its alleged injury was the “increase in cost of operations from \$45.00 to \$50.00 per thousand board feet,” *id.* at 2051. Another plaintiff, The Save America Club, included “those who are concerned about the economic prosperity of their state,” *id.* at 2050, and more particularly about developing “mineral resources lying beneath the forest,” *id.* at 2051. Three individual plaintiffs, all forest users, were also added.

446. *Id.* at 2050. See *supra* p. 1485 (discussing role of West Lumber Co. in establishing SELF).

447. See also *McGill v. EPA*, 593 F.2d 631 (5th Cir. 1979) (presenting question of whether consumers of pesticide Mirex who opposed cancellation of Mirex registrations have right to prevent settlement (involving indefinite suspension of EPA hearing to which both the registrant and EPA have

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Insider interests remain present in SELF's nuclear energy actions. In *Baltimore Gas & Electric Co. v. Natural Resources Defense Council*,⁴⁴⁸ environmental groups had challenged NRC rules providing that, for purposes of NEPA, the permanent storage of certain nuclear wastes would have no significant environmental impact and, therefore, no effect upon the licensing decision. SELF appeared as counsel for an *amicus* organization known as Scientists and Engineers for Secure Energy ("SE2"), arguing in support of the defendants, which included Consolidated Edison and the NRC itself, that the "zero release assumption" was proper.⁴⁴⁹ SELF's ties to the industry at issue were troublingly close. Through 1981, a chief executive of Florida Power & Light (FP&L), served on SELF's board; in 1982, another FP&L executive joined the board of legal advisors. FP&L operates four nuclear power plants. Major SELF contributors include Duke Power, Atlanta Gas Light, and South Carolina Electric & Gas. In addition, Duke Power and Virginia Electric & Power Co. are listed as clients of two members of the litigation board. Each of these utilities has invested heavily in nuclear power.⁴⁵⁰

SELF has also demonstrated an interest in labor cases. While no labor case was rated invalid, several showed a close relationship to the private interests of SELF's supporting industries. In *United Steelworkers of America v. Weber*,⁴⁵¹ a class of non-minority employees of Kaiser Aluminum challenged an affirmative action agreement between United Steelworkers and Kaiser. In its brief on behalf of the non-minority employee, SELF argued that even the voluntary use of affirmative action quotas must be strictly limited. Kaiser Aluminum is a major client of a firm rep-

agreed). On behalf of the petitioners, the Louisiana Department of Agriculture, and two Georgia state congressmen, the SELF argued that the EPA administrator improperly terminated the hearing. The likely financial beneficiaries of SELF's position in this case were those engaged in agricultural production and chemical manufacturing industries. Seven SELF board members and at least an equal number of SELF's major contributors represent those interests; 3 SELF litigation committee members represent 10 corporations also involved in these areas.

448. 103 S. Ct. 2246 (1983).

449. That this relationship was not coincidental is borne out by SELF's remaining cases in the field. In *FERC v. Mississippi*, 456 U.S. 742 (1982), both SELF and Florida Power & Light filed companion *amicus* briefs. In *Duke Power Co. v. Carolina Envtl. Study Group*, 438 U.S. 59 (1978), SELF's brief argued in favor of the Price-Anderson Act, which provides a limitation of liability for nuclear power companies. Aside from the obvious economic benefit to utility companies associated with SELF, insurance companies also stood to gain from the limitation of liability; nearly 50 insurance companies are listed as the private clients of the firms represented on SELF's litigation board.

450. For a more generalized example of the insider problem, see *NRDC v. SEC*, 606 F.2d 1031 (D.C. Cir. 1979), where SELF argued in support of the Commission's decision not to require disclosure of corporate compliance with environmental laws in registration statements for the public. Whatever public interest, separate from that of corporations, might be imagined in non-disclosure, the most obvious dividends from SELF's position ran to SEC-regulated corporations themselves which are, of course, the major component of SELF's Board of Directors, contributors, and clients of firms represented on SELF's litigation committee.

451. 443 U.S. 193 (1979).

resented on the SELF litigation board, and SELF's position, in apparent opposition to Kaiser, was at first blush unusual. On closer analysis, SELF's brief contains the following statement:

In the typical collective bargaining agreement, such as the one Weber has challenged, the employer and the union agree to take certain affirmative action. The impetus for such agreements may be simply the good intentions of the parties, or as in this case, fear of future litigation and threats from the Federal government.⁴⁵²

The perceived fears to which the quotation refers are most likely those of the employer, Kaiser Aluminum. SELF's role is now more clear. Its brief permitted Kaiser, through the auspices of this firm, to attack the collective bargaining agreement it made with United Steelworkers without the expense of having to retain private counsel, and while maintaining an appearance of good faith. Because this hypothesis remains unproven, the rating for this case was questionable. Because the hypothesis seems quite likely to be accurate, the rating is probably forgiving.⁴⁵³

J. *New England Legal Foundation*

The organizational statement in its newsletter, "The Docket," reads: "New England Legal Foundation is a tax exempt, nonprofit public interest law foundation representing the economic interest of citizens in courts and administrative proceedings."⁴⁵⁴ In its 1982 Annual Report, NELF's Chairman and Executive Director jointly declare that its successes have "firmly established NELF as the legal advocate for the economic interests of the region."⁴⁵⁵ Just so.

NELF was formed and funded by the New England Business Council, with additional funding sought from banks, corporate offices, law firms, and unions.⁴⁵⁶ The first revenues were modest, \$146,387 in 1977,⁴⁵⁷ with

452. Brief of Southeastern Legal Foundation, Amicus Curiae at 12, *United Steelworkers of America v. Weber*, 443 U.S. 193 (1979). See SELF Report, Spring, 1979 at 1.

453. Ratings of the other labor cases could be equally generous. In *Virginia ex rel. Comm'r, Dep't of Highways & Transp. v. Marshall*, 588 F.2d 599 (4th Cir. 1979), for example, Virginia planned to construct a segment of interstate highway using state and federal matching funds. The Secretary of Labor, pursuant to the Davis-Bacon Act, decided that the additional work on a related rail line required the payment of a higher minimum wage than that paid for conventional construction work. SELF argued that the Secretary's decision under the Act had increased construction costs. NCLPI Legal Activities Rptr., Feb. 1980; SELF Report, Spring 1978. One might assume that the contractors involved would have been able to retain private counsel. Further, while several contractors are associated with the SELF as contributors and board members, it could not be determined if these firms were engaged in the construction of the highway at issue. The mere possibilities in this scenario, without more, are not sufficient to throw the SELF's activities into question. But the doubts on both feasibility and inurement grounds remain.

454. NELF, *The Docket*, Apr. 1983, at 2.

455. NELF, 1982 ANN. REP. 1.

456. *A Business Brand of Public Law*, BUS. WEEK, Sept. 16, 1976, at 42.

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steady increases to a projected revenue of \$500,000 in 1983.⁴⁵⁸ This progressive growth in contributions, and the increasing requests for NELF legal action “demonstrated the confidence of potential clients” in the organization.⁴⁵⁹

The nature of NELF’s donors, and a clue as to its “clients,” can be provided by categorizing its income sources into three groups: corporate, foundation, and individual. Of \$131,000 in contributions during 1977, corporations contributed \$110,000, or 84%; \$15,000, or 11%, came from foundations (a category which includes corporate foundations); \$6,000, less than 5%, was from individuals (the figure probably includes gifts from corporate officers).⁴⁶⁰ The pattern held in 1982, with 98% of all contributions received from corporate and foundation donors.⁴⁶¹ In five years, total income from individuals, however placed, rose from \$6,000 to \$9,000.⁴⁶²

The same priorities appear on NELF’s board, which, in 1982, consisted of twenty-four officers and members at large.⁴⁶³ Sixteen were leading executives of corporations which loom large in the economic development of the New England region, including the First National Bank of Boston, Federal Home Bank of Boston, Cabot Corporation, Connecticut Bank and Trust, and the Aetna Life and Casualty Company.⁴⁶⁴ NELF litigation is approved by a legal review committee. The current chairman is senior vice president and general counsel of the Gillette Company.⁴⁶⁵ Its chairman from 1980 to 1982 was the vice president, general counsel, and corporate secretary of Aetna.⁴⁶⁶

Supported by this funding and under this board’s direction is a staff of four attorneys headquartered in Boston. It is, of course, theoretically possible that NELF’s activities would be divorced from the corporate interests that support them. Instead, NELF appears to go out of its way to advertise the services it performs for the New England business community. Its 1982 Annual Report promises “the extension of our *formal working relationship* with business and trade associations.”⁴⁶⁷ An April 1983 report describes NELF’s representation of the Greater Hartford Chamber

457. NELF Income Tax Return for 1981, Form 990, at 2, item 16.

458. NELF, *supra* note 454, at 2. Income levels in the intervening years are reported as \$224,000 in 1978, \$273,000 in 1979, \$350,000 in 1980, and \$445,000 in 1982 (1981 figures were unavailable). *Id.* at 7; NELF Income Tax Return, *supra* note 457.

459. NELF, *supra* note 454, at 1.

460. *Id.* at 8 (“Source of Contributions” Table).

461. *Id.* The figures are \$311,000 from corporate sources, \$110,000 from foundations, and \$9000 from individuals.

462. *Id.*

463. *Id.* at 10-11.

464. Seven additional Board members were partners in private firms which had, in common, large corporate practices. One member was drawn from academia. *Id.* at 11.

465. NELF, *The Docket*, Apr. 1983, at 2.

466. *Id.* at 3.

467. NELF, *supra* note 454, at 2 (emphasis added).

of Commerce and the Connecticut Business and Industry Association on siting legislation for waste storage.⁴⁶⁸ A July 1983 report shows NELF drafting similar legislation on behalf of the Massachusetts Business Roundtable, the Associated Industries of Massachusetts, the Massachusetts High Technology Council and the South Shore Chamber of Commerce.⁴⁶⁹

NELF's services extend even beyond these business groups. NELF has reported the representation of "its clients," Aerovox and Pflow Industries, two profit-making corporations, in a suit against the Massachusetts Elevator Board concerning restrictions on conveyors. As NELF explained the interests in the case, Aerovox is "one of many companies in Massachusetts which uses conveyors," while Pflow is a "conveyor manufacturer."⁴⁷⁰

These examples preview the nature of NELF's legal work. The NELF docket was evaluated as follows:

TABLE 7
NEW ENGLAND LEGAL FOUNDATION

	Party/ Intervenor	Amicus	Total
Valid	2	5	7
Invalid	3	17	20
Questionable	1	5	6

In its first years, NELF's litigation showed an almost single-minded pre-occupation with energy development. The firm's federal tax return for 1979 listed nineteen proceedings in which it was engaged as a party or *amicus*.⁴⁷¹ Of these, fifteen concerned energy production: six cases in oil development, six in nuclear energy, and three more in utilities regulation.⁴⁷² NELF's docket has since broadened somewhat into labor and

468. NELF, *supra* note 453, at 5.

469. NELF, *The Docket*, July 1983, at 3.

470. *Id.* at 4. In another action, contemporaneously reported, NELF represented The New England [Business] Council, Associated Industries of Massachusetts, a major manufacturing organization and three individuals as clients in a brief defending Massachusetts' Hazardous Waste Facility Siting Act. *Id.* at 5.

471. NELF, *Income Tax Return for 1979*, Form 990.

472. The cases listed on the schedule were: *Oil*: Massachusetts v. Andrus, Conservation Law Found. v. Andrus; *In re* Nomination of Georges Bank as a Marine Sanctuary; Roosevelt Campobello Int'l Park Comm'n v. Costle; *In re* NPDES Permit Application No. ME 0022420 of the Pittston Co. *In re* Applications for Exemptions filed by the Pittston Co. National Wildlife Fed'n v. Endangered Species Review Bd.; and Pittston Co. v. Endangered Species Comm. *Nuclear energy*: Massachusetts Mun. Wholesale Elec. Co. v. Massachusetts Dep't of Pub. Utils.; Seacoast Anti-Pollution League v. NRC; *In re* New England Power Co.; New England Power Co. v. Goulding; *In re* An Inquiry into Comparative Economics of Generation of Elec. by Nuclear & Other Means; *In re* Boston Edison Co. v. Massachusetts Dep't of Pub. Util.; *Other energy matters*: *In re* Application of Conn. Light & Power Co.; *In re* Application of the Hartford Elec. Light Co.; Consolidated Edison Co. v. New York

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toxic substances issues. While these issues admit certainly of several public interests, the firm's actual involvement is accompanied by some now-familiar problems.

For one, NELF litigation shows little sensitivity to the presence of inside beneficiaries. *Miner v. Gillette Co.*⁴⁷³ concerned a challenge to an Illinois class action statute that extended jurisdiction over Gillette even though it was not a domiciliary of that State. In an *amicus* brief in support of Gillette, NELF argued that the Illinois statute was an impermissible intrusion upon the sovereign power of sister states. At the time the litigation began, the senior vice-president and general counsel of Gillette served on the board of NELF. He has since become chairman of the NELF litigation committee.

Inside interests appear again in *First National Bank v. Bellotti*,⁴⁷⁴ a suit to invalidate state-imposed limitations on corporate contributions to a public referendum. NELF's *amicus* brief joined the First National Bank and the brief of other *amicii*, including the U.S. Chamber of Commerce, to argue the restrictions were unconstitutional. While corporate free speech is doubtless a principle with public interests broader than corporations themselves, NELF's participation in this case may also reflect the fact that its chairman is executive vice president of plaintiff First National Bank of Boston.

*Connecticut Fund for the Environment v. Environmental Protection Agency*⁴⁷⁵ presents the insider problem in a different form. Representing Connecticut Business and Industry, a trade association that also litigates through counsel retained from the private bar,⁴⁷⁶ NELF intervened to support EPA's approval of a Connecticut regulation that raised the permissible levels of sulphur content in fuel. The vice-chairman for Connecticut Business and Industry serves on the NELF board. He also serves as chairman of the Barnes Group of corporations with subsidiaries in foundries, smelters, heavy construction, mechanical contracting, and steam heating,⁴⁷⁷ enterprises with no small financial stake in sulphur emission levels.

State Pub. Util. Comm'n; *New England Legal Found. v. Costle*. NELF Income Tax Return for 1979, Form 990, Schedule A, attachments to line 78 at 1-7.

473. 459 U.S. 86 (1982) (certiorari dismissed for want of jurisdiction).

474. 435 U.S. 765 (1978).

475. 696 F.2d 169 (2d Cir. 1982).

476. Telephone interview with public information representative, Connecticut Business and Industry, Inc. (Oct. 14, 1983).

477. These subsidiaries include: Barnes Hind Pharmaceuticals; J.J. Barnes (mechanical contractors); John S. Barnes Corp. (industrial hydraulic equipment); Barnes & Jones (steam heat apparatus); Barnes Press; Barnes & Reinecke (electronic, earth-moving and mining equipment on-site design and drafting service); Robert A. Barnes (laundry supplies, aluminum smelter); W.F. & J.F. Barnes, Inc. (lumber, building products).

NELF cases in support of utility companies are similarly colored. One NELF director, for example, also serves as vice-president for eight separate New England utility companies.⁴⁷⁸ It is not surprising then to find a NELF brief supporting a Connecticut Light and Power petition for a review of a FERC order suspending a proposed new rate schedule.⁴⁷⁹ Connecticut Light and Power is one of the utilities served by the NELF director. NELF later intervened for Connecticut Light and Power in a subsequent lawsuit.⁴⁸⁰ Yet another action found NELF before the Connecticut Division of Public Utilities Control in two rate hearings styled *In re Application of the Connecticut Light and Power* and *In re Application of the Hartford Electric Light*.⁴⁸¹ NELF's director is a director of Hartford Electric Light as well.

At least ten cases found NELF representing one or more trade associations, chambers of commerce or business leagues. In *Conservation Law Foundation v. Andrus*, for example, NELF prepared a brief of *amicus curiae* for four New England chambers of commerce.⁴⁸² Similarly, in *Conservation Law Foundation v. Watt*,⁴⁸³ NELF filed for itself and the Greater Boston Chamber of Commerce. The linkage between the business PILFs and these business associations on issues, representation, and even funding sheds light on a more appropriate tax-exempt status for this type of legal work, a subject soon to be addressed below.

K. Capital Legal Foundation

The Capital Legal Foundation ("Capital"), incorporated in Washington, D.C., in 1977, is the last of the studied firms. Originally sharing offices with NLCPI, Capital started operations with grants and contributions totalling \$143,000,⁴⁸⁴ supporting one attorney and a single secretary. In 1979, with contributions at \$147,500 and expenditures at \$154,000,⁴⁸⁵ Capital recruited a new leader from a private, international law practice in Boston. The new president, described by the media as "eccentric" and "brash," has described himself as more of a "libertarian" from the "radical middle" than a "pro-business" conservative.⁴⁸⁶ Since then, Capital's

478. City and Suburb Electric and Gas Co., Connecticut Gas Co., Connecticut Light & Power Co., Electric Power Co., Hartford Electric Co., Holyoke Water Power Co., Northeast Utilities, Western Massachusetts Electric Co.

479. Connecticut Light & Power Co. v. FERC, 627 F.2d 467 (D.C. Cir. 1980).

480. See NELF Income Tax Return for 1979, Form 990, NELF, schedule A, item 13.

481. *Id.* item 16.

482. NELF, Income Tax Return for 1979, Form 990 (unreported case).

483. 560 F. Supp. 561 (D. Mass. 1983).

484. Capital Legal Foundation, Income Tax Return for 1979, Form 990, schedule A, Part IV, line 11.

485. *Id.*, Part I, line 12.

486. *Blodgett, supra* note 196, at 75.

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public statements have had a tough-minded, independent ring. "We are not pawns of the business community," its president has asserted in reported interviews, and demonstrated on at least one occasion.⁴⁸⁷ Perhaps as a gesture of this independence, Capital recently severed its ties with its parent, NLCPI.

Capital has adopted as its motto: "A Public Interest Law Firm Concerned with a Fair, Free Market Approach to Federal Regulation."⁴⁸⁸ The firm's stated interest is in cases that "have a reasonable potential to alter fundamental federal law in our country in a fashion favorable to us";⁴⁸⁹ it monitors federal agencies for "upcoming issues of significance to our constituents."⁴⁹⁰ Determining exactly what is meant by "us" and "our constituents" is an exercise that leads to people and money.

In 1980, Capital's financial outlook changed dramatically for the better. The firm received \$305,000, against expenditures of and \$255,000.⁴⁹¹ The next year, Capital raised \$591,000, spending \$506,000.⁴⁹² The firm's 1982 operating budget was projected at over \$850,000,⁴⁹³ sufficient to employ five attorneys, nine support staff, and three legal interns. The sudden improvement in financing was the result of gifts from business corporations and their private foundations. As of 1981, sixty-three percent of Capital's contributions came from private foundations while thirty-seven percent was donated by the business community. In the words of its president: "Frankly, without the foundations, we go down the tubes."⁴⁹⁴ Capital's contributor list for 1981 also included twenty-five of the largest oil, gas, chemical, and construction corporations in the world, each with major domestic and international operations.⁴⁹⁵ Contributions from individuals accounted for less than two percent of the firm's revenues.

Capital's board of directors is composed of its president, four executive officers of major corporations, two academicians, and a representative

487. *E.g.*, Zeidner, Can Pro Bono be Pro Business?, A.B.A.J. Oct. 1983, at 15. Indeed, its president has indicated that he plans to "challenge" U.S. Department of Defense spending policies, *id.*, suits which would be likely to alienate defense contractors. Capital has sued to oppose federal indemnities for U.S. banks holding defaulted loans to Poland. See CAPITAL LEGAL FOUNDATION, 1982 ANNUAL REPORT 4.

488. CAPITAL LEGAL FOUNDATION, 1981 ANNUAL REPORT (1981).

489. Memorandum from Dan M. Burt to Chairman and Board of Directors entitled "Mid-Year Report," undated, on file with author, at 6.

490. *Id.* at 10.

491. Capital Legal Foundation, Income Tax Return for 1980, Form 990, Part I, line 12.

492. *Id.*, Part III, line 40.

493. CAPITAL LEGAL FOUNDATION, 1981, ANN. REP. 12.

494. Transcript of telephone conversation between Dan Burt and John Richard of NYPIRG at 7, 15 (Apr. 9, 1982) (on file with author).

495. The list includes Fluor Corp., Chase Manhattan Bank, 3M, Twentieth Century Fox, Ball Corp., Union Carbide, Westinghouse Electric, General Electric, Ford Motor Co., Dow Chemical, American Gas Association, Houston Oil and Minerals, Atlantic Richfield, Chevron, U.S.A., Inc., Exxon, Gulf Oil Corp., Marathon Oil, Mobil, Phillips Petroleum, Shell Oil, Southern California Gas, Sohio, Sun Company, Texaco, and Union Oil of California. Mokhiber, Capital Legal Foundation: Behind the Public Interest Facade (undated) (unpublished manuscript on file with author).

from the American Enterprise Institute for Public Policy Research. Both Peter J. Fluor, president of Texas Crude, Inc., and Leslie M. Burgess, vice president of Fluor Corporation, sit on Capital's board, Burgess as chairman. Unlike the other business PILFs, Capital maintains neither a legal advisory council nor a public affairs council. If case selection is screened at all beyond the staff, it is apparently by this board.

The Capital firm cases⁴⁹⁶ were evaluated as follows:

TABLE 8
CAPITAL LEGAL FOUNDATION

	Party/ Intervenor	Amicus	Total
Valid	4	1	5
Invalid	5	2	7
Questionable	2	1	3

Private inurement is the most troubling theme of this docket. Unmistakable here are the strong ties between Capital and the Fluor Corporation,⁴⁹⁷ a multi-billion dollar contractor for energy facilities in the United States and abroad. The corporation also owns substantial domestic and foreign properties in oil, coal, and gas. Fluor has been particularly active in the Middle East since 1940, and its gas-gathering plant in Saudi Arabia is the largest such facility in the world. Between 1977 and 1979, Fluor's contracts with the Arabian American Oil Company ("ARAMCO"), a United States oil firm consortium, gave Fluor revenues totalling over one half billion dollars; Exxon, Texaco, and Mobil Oil—also major contributors to Capital—own thirty percent of ARAMCO.⁴⁹⁸ Fluor's 1979 profits of just under \$100 million place it among the 100 largest American corporations.⁴⁹⁹ The vice president of Fluor serves on Capital's board as does Peter Fluor, a major stockholder. When asked in one interview about his relationship with Peter Fluor, Dan Burt, Capital's president, responded, "Peter is a personal friend, which is why he is on the board."⁵⁰⁰

496. In addition to litigation, Capital has engaged in a range of ancillary activities such as the publication of white papers and books (e.g., D. BURT, *infra* note 514) and opposing nominations to administrative positions (e.g., Reuben A. Robertson as chairman of the Administrative Conference). CAPITAL LEGAL FOUNDATION, 1981 ANN. REP. 7-8, and lobbying for or against proposed legislation (e.g., the Equal Access to Justice Act), *id.* at 8.

497. For a fuller discussion of Capitol and Fluor, see R. Mokhiber, *supra* note 495. *Inter alia*, Fluor's Burgess introduced Burt to Capitol. *Id.* at 1.

498. *Id.*

499. BIG BUSINESS DAY, CORPORATE SHADOW BOARDS; BIG BUSINESS DAY SPECIAL REPORT 25 (undated) (excerpted in R. Mokhiber, *supra* note 495, at 25).

500. Transcript of telephone conversation between John Richard, New York Public Interest Re-

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The relationship is also professional. Burt has previously represented the Fluor Corporation on legal matters.⁵⁰¹ Burt likewise has strong professional interests in Saudi Arabia. The private law firm which Burt founded maintains offices in Al Khobar; Fluor's Arabian, Ltd., headquarters are also located in Al Khobar. When Burt more recently joined a Pittsburg-based law firm as head of its Washington, D.C. office, his background as an international law and tax specialist with a "large number of clients in Saudi Arabia" reportedly gave him expertise in the area.⁵⁰² The relationship between Burt and Fluor, Burt's private legal practice in Saudi affairs, and Burt's direction of a public interest law firm creates a situation in which, to say the least, harmonies of private and public interest can arise.

Arise they do. Intentionally or not, Capital's actions have benefitted Fluor and other Capital supporters and directors. In 1978, the Securities and Exchange Commission informed Fluor that Fluor officials "may have been or are making payments to foreign officials including payments in Saudi Arabia."⁵⁰³ Shortly thereafter, Capital announced that it had targeted the Foreign Corrupt Practices Act ("FCPA") for modification or repeal. On May 30, 1980, Capital submitted "extensive comments to the Commerce Department on the FCPA's dangerous effect on United States exports."⁵⁰⁴ Subsequently, during an off-the-record session with the General Counsel of the Commerce Department and senior State and Treasury Department officials, Capital "presented a new proposal to decriminalize the FCPA and limit its penalties"⁵⁰⁵ Whatever rationale might be offered for these actions, there can be no denial that Capital's participation aided Fluor and other supporters with enterprises overseas. Burt has offered the following rationale:

When you introduce a concept like the Foreign Corrupt Practices Act you have to ask yourself what does it do to the exports. And let me tell you, there are countries in the world where you won't sell products, you just can't sell it. It's hard to believe, but that's how it works. Do you have any idea what it is like in Saudi Arabia? I lived there, and I'm telling you, aside from the personal danger, you don't sell anything unless there is someone getting it one way or the other. And you're not going to change the morality in Saudi Arabia. . . .

search Group, and Dan Burt, President, Capital Legal Foundation 6 (Apr. 9, 1982).

501. *Id.* 4-5, 8 (Apr. 11, 1982).

502. Brevetti, *Saudi Economy Said to be Threatened*, J. Comm., Aug. 23, 1982.

503. Letter from SEC to Fluor Corp. (Sept. 27, 1978) (quoted in R. Mokhiber, *supra* note 495, at 2).

504. Burt, Capital Legal Foundation 1980 Mid-Year Report 8 (unpublished).

505. *Id.*

What the hell are you going to do about the legislation? It is the stupidest [expletive deleted] law I've seen in my life.⁵⁰⁶

Taking the statement as accurate, and disassociating it from Fluor, from other donor corporations, and from Burt's private, international practice, it would be difficult to style the interest represented here as essentially public.

The insider benefits do not stop with this case. Because the Fluor Corporation is heavily involved in oil and gas production, its workers are also systematically exposed to the carcinogen benzene. In *Industrial Union v. American Petroleum*,⁵⁰⁷ suit was brought challenging the validity of a proposed OSHA regulation which would have reduced the permissible exposure limit on airborne benzene. Capital argued on brief, as did numerous other parties, that the regulation should be invalidated because it was unsupported by appropriate government findings. Whatever Capital's argument did to refine the level of analysis for the court, it also supported Fluor and other oil and gas interests which contribute to the firm.

In a similar vein, Capital has worked to overturn OSHA standards governing the permissible amounts of exposure to lead in the workplace.⁵⁰⁸ It may only be coincidental that St. Joe's Minerals, one of Fluor's largest subsidiaries, is also the largest producer of lead in the United States. As a last example, in 1976 Fluor was granted a \$9 million contract from the federal government to design and engineer a new high-capacity facility for solidifying liquid nuclear wastes.⁵⁰⁹ Shortly thereafter Capital entered a federal rulemaking on nuclear waste disposal and the effect of plutonium recycling.⁵¹⁰

More visibly promoted on the Capital docket are the representation of private individuals pitted against an overbearing government. The firm has sued the Federal Communications Commission on behalf of Simon Geller, the operator of an FM radio station, whose broadcast license was not renewed.⁵¹¹ In *Putnam v. Department of Labor*,⁵¹² Capital defended the sole proprietor of a small business which sold hand-knitted ski caps and sweaters.⁵¹³ Whatever the attractiveness of these issues or clients, the

506. Transcript of telephone conversation between John Richard, NYPIRG, and Dan M. Burt (Apr. 11, 1984), at 5 (on file with author).

507. *Industrial Union v. American Petroleum*, 448 U.S. 607 (1980).

508. *USWA v. Marshall*, 647 F.2d 1189 (D.C. Cir. 1980). See also R. Mothiber, *supra* note 495, at 2.

509. *Id.*

510. Burt, *supra* note 504, at 9; see also *Westinghouse Elec. Corp. v. United States*, 598 F.2d 759 (3d Cir. 1979) (Capital challenged suspension of NRC decision on nuclear fuel recycling).

511. *Geller v. FCC*, No. 82-2400 (D.C. Cir. filed Nov. 28, 1982); see CAPITAL LEGAL FOUNDATION, 1982 ANNUAL REPORT 3.

512. The case is described in CAPITAL LEGAL FOUNDATION, 1981 ANN. REP., 4; see Capital Legal Found., Newsletter, July 27, 1982.

513. The U.S. Department of Labor cited Putnam and his suppliers (who worked, in the main, at

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question rises whether these individuals, represented directly by a PILF, could have retained private counsel.⁵¹⁴

This question is unavoidably raised in Capital's leading case of the moment, *Westmoreland v. CBS*.⁵¹⁵ On January 23, 1982, the Columbia Broadcasting System (CBS) aired an investigative special entitled "The Uncounted Enemy: A Vietnam Deception," which documented an alleged conspiracy between President Johnson, the Central Intelligence Agency, and General William Westmoreland's headquarters in Viet Nam over America's growing role in that war during 1960's. In September 1982, claiming that through deceptive editing and reporting techniques he was subjected to "character assassination,"⁵¹⁶ Westmoreland filed suit for libel in the amount of \$120 million against CBS, Mike Wallace, CBS's president and producer, and CBS's paid consultant for the special. Capital is representing Westmoreland in the action; it has been assisted by Accuracy in Media ("AIM") in raising funds for the case.⁵¹⁷ The case was rated invalid. At bottom, granting Capital the highest of motives, General Westmoreland is being given tax-exempt counsel to litigate a civil damage claim. The private bar has long and actively represented well-known individuals in libel actions against major media defendants, for large damage awards.

In the final analysis, Capital's docket reveals an organization not so

home) for violations of DOL's regulations promulgated under the Fair Labor Standards Act of 1938. Capital argued that the regulations in question were outdated and oppressive. The firm was successful in seeking a change in the regulations, and hoped that the result would "help facilitate a fundamental change in the direction of federal regulation in the workplace away from the expansion of federal control which has characterized it for the last four decades." Capital Legal Found. Newsletter, July 27, 1982; see *Stowe Woolens Owner Survives Probe*, Burlington Vt. Free Press, Dec. 7, 1980, at 4.

514. Another activity from which Capital has drawn attention is its critique of a network of organizations fostered by consumer activist Ralph Nader. The critique was later published. D. BURR, *ABUSE OF TRUST: A REPORT ON THE RALPH NADER NETWORK* (1982). Capital's President has complained of "the reign of terror Nader and his groups have brought down upon the economy," that Ralph Nader himself is "rich" and unconscious of the effects of his actions on the poor, and that Nader groups, while seeking disclosure of corporate financing in public affairs, have been reluctant to disclose their own financing. *Id.* at 139-42. Responses to these allegations have included observations that Capital itself had not complied with the disclosure requirements of state charitable solicitation statutes, and that Capital's President, with a private law practice and an annual salary from Capital of \$80,000 a year, was in a tenuous position to level charges of elitism. See *Capital Legal Foundation-Partial List of Errors and Omissions*, 1-3 (undated) (on file with author). This debate, while not without its interest, is not probative in the context of this study.

515. Civ. No. 82-7913 (S.D.N.Y. filed Sept. 13, 1982) See Capital Legal Foundation, Capital Letter, "Independent Journalism—of Threats and the Public Trust," September 16, 1982, wherein Capital describes the initiation of the Westmoreland suit.

516. Fund-raising letter from General William Westmoreland on behalf of AIM (undated) (on file with author).

517. AIM is a tax-exempt organization formed in 1969 "to bring issues of media abuse to the attention of the public as a means of developing a greater sense of media responsibility." *Id.* AIM has formed the Westmoreland Legal Aid Fund to raise money for the lawsuit, and mailed out letters to its members soliciting donations. In his fundraising letter for AIM, General Westmoreland set forth his version of the facts of the CBS special, praised the work of AIM, and closed with an exhortation to join the ranks of AIM's members. *Id.*

broadly aligned with business interests as other PILFs studied, but by no means free of their influence. The ties between Capital, Fluor, and other corporations provide the continuing potential for insider benefit, whether or not intended, and serve to underscore the dangers inherent in the reliance, by this firm and others, on financing and direction from the business sector. As will next be seen, this reliance has also been noted and criticized from an entirely different source.

L. *Corroboration from an Unlikely Quarter: The Horowitz Report*

*All too often, conservative public interest law firms serve as mere conduits by which monies contributed by businessmen and foundations are given to private law firms to assist it in the prosecution of "its" cases.*⁵¹⁸

The analyses just presented are not flattering. The proposition that the examined firms are reacting to ideology and only indirectly reacting to business interests appears belied by their dockets, their direction, and their funding. The author was not privy to the actual case discussions, fund raising, and the full range of corporate and client interests that, perhaps less incriminatingly and perhaps more so, led to these actions. The story is thus far limited to the public record.

Confirmation comes from an insider. In 1979, the Scaife Foundation, a major underwriter of conservative organizations and of several business PILFs, commissioned Michael Horowitz to analyze the effectiveness of its contributions.⁵¹⁹ Horowitz came to the task as a strong proponent of their practice.⁵²⁰ His conservative credentials were established in service on the National Advisory Committee of the Republican National Committee, as legal advisor to Senator Paul Laxalt, and by his appointment as General Counsel to the Office of Management and Budget in the current Administration. His analysis for the Scaife Foundation took him within each of the examined business PILFs, to their staffs, to donors, and to meetings of their boards and litigation committees. His report, over one-hundred pages in draft, is a tour-de-force of public interest law and the new business PILFs from a strongly supportive and frankly acknowledged conservative view. In unambiguous language, as an insider and friend, Horowitz found the same state of affairs.⁵²¹

518. Horowitz Report, *supra* note 301, at 30a.

519. *Id.* at 1.

520. Mr. Horowitz begins his study: "This has been a difficult report to write; difficult because it is often critical of people I very much like and of a movement for whose success I so much hope." *Id.*

521. The full contents of the Horowitz Report are not discussed here. The relevant sections of the Report for this study are those which identify the relationship of the business community to these PILFs. They are not isolated sections nor are they taken out of context; for reasons quite different from the tax considerations of this study, Mr. Horowitz sees this relationship as the critical limiting

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The Horowitz Report starts from a premise quite removed from the requirements of § 501(c)(3) for public interest law firms. Horowitz sees PILFs as players in a larger clash of philosophies, a battle that will be won not in the courtroom but in the minds of legislators, judges, the media, and—ultimately—the American people. The “conservative” PILF,⁵²³ however, “will make no substantial mark on the American legal profession and American life as long as it is seen as and is in fact the adjunct of a business community possessed of sufficient resources to afford its own legal representation.”⁵²⁴ The perception is unfortunately, he laments, well-grounded. “Conservative public interest law firms are seen as being largely oriented to and indeed dominated by business interests, a description which is unhappily not wide of the mark for many such firms.”⁵²⁴ The task for these firms is “to mitigate their present appearance and reality as duplicative spokesmen for business interests.”⁵²⁵

The report identified several ways in which business interests dominate these PILFs, none of them surprising to readers of earlier sections of this study. “The movement is . . . dominated by business leaders who are its limited but important financial subscribers.”⁵²⁶ The boards of directors of the even more broadly oriented groups, such as the Pacific Legal Foundation, are “homogeneous bodies of businessmen.”⁵²⁷ The PILF agendas cater almost exclusively to the interests of businessmen, forgoing other, more genuine opportunities to vindicate conservative values.⁵²⁸ “It is critical that the conservative movement seek out and find clients other than large corporations and corporate interests.”⁵²⁹ Horowitz went so far as to foresee “the coming presence of an enormous number of circumstances in which a conservative public interest law movement may be opposed to the positions of many businesses and industries.”⁵³⁰ Whatever the size of this perceived opportunity, it would be fair to conclude from the examined dockets that the business PILFs have yet to embrace it.

Case handling and fees are also suspect: “all too often” funneled to private practice.⁵³¹ Several PILFs “routinely serve as conduits for the

factor in the future of these organizations.

522. Unlike PLF’s Zumbrun and other business-PILF spokesmen, Horowitz studiously avoids the “pro-business” label in his report, characterizing the firms instead as “conservative.” This distinction is indeed the goal of his report.

523. Horowitz Report, *supra* note 301, at 2.

524. *Id.* at 1.

525. *Id.* at 2.

526. *Id.* at 4–5; *see also id.* at 51 (“[D]irect receipt of funds by conservative public interest law firms from organizations comprised solely of businessmen has been and is likely to remain a source of fundamental and effective criticism of these firms.”).

527. *Id.* at 70.

528. *Id.* at 83.

529. *Id.* at 85. Horowitz goes on to suggest new vistas of “conservative” PILF involvement such as the “social values” of the “middle-class.” *Id.* at 86.

530. *Id.* at 26.

531. *Id.* at 58.

payment of substantial if at times reduced fees to private firms."⁵³² These payments rise to the level of a "conflict of interest" when made to "public interest law firm board members or key advisors."⁵³³ Even with reduced fees, "such payments severally prejudice the relationship between the firm and its advisors/board members" and "throw into question" the latter's "motivations and commitments."⁵³⁴

The report speaks to case selection in more detail—"the unhappy extent to which cases chosen by many conservative public interest law firms focus on the needs of the business community, to the exclusion of other areas of interest."⁵³⁵ It "may not be accidental" that the case agendas, which reveal a "striking preoccupation" with environmental and land use matters, "reflect the greatest direct concerns of the movement's business donors."⁵³⁶ All of these factors help confirm the description of these PILFs as "business-oriented entities."⁵³⁷

Horowitz seeks to divorce these PILFs from the business community. He recommends seeking alternative clients—such as the poor and consumers—to articulate conservative positions.⁵³⁸ There is a whiff of the Potemkin village about these recommendations. At bottom, as Horowitz acknowledges early in his report, "the need to protect the profitability and productivity of the private business sector" forms a "significant premise" of any conservative PILF.⁵³⁹ That this profitability cannot find adequate private representation in all but the most extraordinary cases seems hard to imagine. It seems equally unlikely that business corporations would be willing to invest heavily in firms that did not, under whatever cover, represent their interests. Thus, for these PILFs to find other named clients to carry the business "premise" would not seem to change materially the nature of their litigation. Whatever the merits of the Horowitz's suggestion, the examined PILFs have yet to apply it even as cover; alternative clients have yet to become the norm.

The Horowitz Report is the analysis of a philosopher, an idealist, and a friend. It finds that the service of these firms to corporate interests is a fundamental impediment to their success. It does not address the impediment this same relationship poses to their tax exempt status. That status is, however, predicated on the same principle: the independence of qualified, exempt firms from interests which could be adequately represented by the commercial bar. The dockets examined in this study and the conclusions drawn from them are not an anomaly. They are the way it is.

532. *Id.* at 4.

533. *Id.* at 59.

534. *Id.*

535. *Id.* at 83.

536. *Id.* at 82-83.

537. *Id.* at 60.

538. *Id.* at 85, 86.

539. *Id.* at 1.

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IV. REFLECTIONS ON THE QUALIFICATIONS OF THE BUSINESS PUBLIC INTEREST LAW FIRMS FOR TAX EXEMPTION AS PUBLIC CHARITIES

Some private attorneys are reported to be upset with the PLF for attracting clients who otherwise would have paid for legal counsel. (As a tax-exempt foundation, the PLF may not accept fees). But the resentment is competitive, not based on ethical or legal considerations.

Business Week.⁵⁴⁰

The Horowitz report examined the operation of the business PILFs in terms of their long-term success. Given the nature of their litigation, it has been surprising to find no research questioning the qualification of these firms as public charities under section 501(c)(3).⁵⁴¹ This study raises these questions. It remains to be seen what can or should be done about them.

A. The "Operational Test" in Action: Some Suggestions for Improvement

Consider an application to the IRS for exemption as a public interest law firm, providing in pertinent part:

- (1) The organization has no members.
- (2) Under its articles and bylaws, overall management of the organization is vested in a Board of Directors, a majority of whom at all times will be executive officers, directors or chairmen of major commercial or industrial corporations.
- (3) The organization will receive more than half its annual

540. BUS. WEEK, Sept. 6, 1976, at 42.

541. See *supra* p. 1512-14. There are perhaps reasons. The charitable exemption provisions of the Internal Revenue Code are an arcane field of law, and one in which it is often difficult to raise and resolve legal questions. No one challenges the Service without at least some subliminal fear of retaliation, and few may test the Service's policies in court, other than with respect to their own taxation, without formidable problems of standing. Perhaps the best explanation for the silence on this issue is that there is no incentive to raise it. The IRS has no financial interest in questioning the eligibility of these firms *sua sponte*; no meaningful revenue is slipping through its fingers. The traditional public interest firms, living in rather constant concern for the continuation of their individual tax exemptions, are effectively deterred. Indeed they may well perceive the business PILFs as something of a shield: "If *those* activities are lawful, ours *have* to be." The recent legal scholarship on the subject of public interest practice has been slender, and has tended to discuss the IRS rulings on fees and funding. See *supra* note 94. For two contemporary studies of business PILFs from a political-science perspective, see P. Rubin & E. Jordan, *Business Oriented Legal Foundations: Who Needs Them? An Economic Justification* (unpublished manuscript 1981) (on file with author) and R. O'Connor & L. Epstein, *Rebalancing the Scales of Justice: Assessment of Public Interest Law* (unpublished manuscript 1983) (on file with author). Even these analyses, which tend not to examine the nature of the litigation, are few and far between. For other, largely unpublished studies in this research, see *supra* notes 171 and 301. The most penetrating analysis, albeit lightly documented, is the Horowitz Report *supra* note 301. The basic eligibility question has simply not been asked.

funding from commercial and industrial corporations and corporate foundations.

(4) Cases selected by the organization for litigation will be reviewed and approved by either the described board or by a litigation committee, the majority of whom at all times will be staff counsel to major commercial or industrial corporations or partners in law firms representing corporate clients.

(5) The organization will primarily undertake litigation wherein the legal issues it addresses and the position it takes on these issues are identical to those being presented by corporate interests in the litigation.

(6) The organization will also enter litigation involving those same corporations and corporate clients that are represented on its boards of directors and litigation, taking the same side and the same legal positions.

(7) The organization will occasionally represent an individual business corporation directly, and on other occasions non-charitable collectives of business interests.

(8) The organization will also enter proceedings, but no more than fifty percent of the time, which involve no identified commercial or industrial interest.⁵⁴²

From the preceding docket histories and analyses, it is fair to say that this application captures the operation of the studied PILFs. It seems also fair to predict that such an application would have difficulty receiving IRS approval as a tax-exempt charity.

Approvals are nonetheless obtained, and maintained—in part a reflection of the inability of the Service's "organizational test" to identify the real nature of the firm.⁵⁴³ More particularly, these discrepancies reflect a failure of the Service's "operational test."⁵⁴⁴ The information presently

542. For some of these firms, an additional statement would provide: "The organization will undertake the representation of individuals directly in actions seeking the recovery of large money damages. These individuals are not required to be indigent or otherwise unable to obtain representation by the private bar."

543. Contrast the above application, for example, which corresponds most obviously to the Mountain States Legal Foundation with the actual application submitted by the Mountain States Legal Foundation and described in Rev. Rul. 75-74. *See supra* p. 1452. The actual application makes no allusion to those commercial and industrial interests that influence, if not control, its Board management, its case selection, and its funding.

544. It would be unfair to suggest that this failure represents a sympathy in the current administration with the business-oriented goals and objectives promoted by these PILFs, although this sympathy is indisputably present. Before his appointment as Attorney General, William French Smith was involved in the establishment of the Pacific Legal Foundation. *See supra* notes 186-87. The author of the Horowitz Report, *see supra* note 301, is currently with the Office of Management and Budget. Other business PILF leaders have played a prominent role in the current administration, including James Watt, former President of the Mountain States Legal Foundation, more recently Secretary of the Department of Interior, and James Marzulla, Watt's successor at Mountain States, now with the Department of Justice. The "operational test" did not apparently surface these discrepancies any more clearly under the previous administration of President Carter. It seems more likely, in addition to those reasons noted earlier, that the Service is simply reluctant to take any action which will stir up

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required of PILFs simply does not include the information needed to discover what the firm is actually doing. For example, nothing in the required Form 990 discloses the business and financial interests of members of a PILF's board of directors, the corporate clients of its litigation approval committees, or the roster of its corporate donors.⁵⁴⁵ Thus, an IRS examiner has little information to help determine whether or not there is "private inurement," that is, whether the decisions to commit the services of the firms are being influenced—for influence, not control, is the Service's articulated standard⁵⁴⁶—by self-interested donors and decision-makers.

On another level, little information is available to evaluate—without considerable additional and independent investigation—whether the issues involved in a PILF's docket could have been adequately presented by existing parties. Form 990, while it seeks the PILF's statement of its interest in the matter, does not require identification of the issues raised by the commercial bar on behalf of those commercial clients in the same proceedings. Thus, a firm may simply state its interest as "availability of energy resources" or "unconstitutional interference with free enterprise," without noting that these same interests are those of co-plaintiff Exxon. The failure of the "operational test" with respect to these firms is not necessarily a matter of will. It would be extremely difficult for anyone, however inquisitive, to determine from Form 990 the extent to which a firm operates in conformance with the law.⁵⁴⁷

For these reasons, the Service, whatever it chooses to do about the activities of the business PILFs in question, should shore up its reporting requirements in each of the areas necessary to determine the continuing eligibility of a PILF under the Service's own standards. While such an effort should involve the give-and-take of public rulemaking, which would elicit suggestions no doubt superior to those presented in this study, the following thoughts concern the shape of the necessary reporting requirements.

As a starting point, any reporting requirement that imposes a burden and that is not of material use ought to be rejected as unnecessary for the hundreds of organizations which might have to comply. Fortunately, the universe of affected organizations can be narrowed from the start. The objective is to surface those monetary interests that could affect the case selection of a public interest law firm—in an analogous way to the (prohibited) effect the Service has recognized might stem from the receipt of

the issue of public interest law, having gone through such a difficult exercise in putting it to rest only a decade ago.

545. A PILF must, however, disclose any donors contributing more than 2% of the PILF's gross income.

546. See *supra* notes 30–33.

547. Indeed, it took this author and the students who assisted him many months to develop information on the interests and issues of only the eight subject PILFs. Even this information is conceded to be incomplete, particularly with regard to questions of private inurement.

attorneys' fees.⁵⁴⁸ In the case at hand, the improper inducement comes not from the receipt of fees but rather more directly from the receipt of funding. The information required should be tailored to this interest.

On the litigation side, it would therefore make sense to require PILFs to contrast their issues and positions with those of parties *on the same side* represented by commercial counsel. It would *not* be necessary—indeed it would be punitively burdensome—to require *all* PILFs to list the issues of all parties in a proceeding in which they were involved. The only overlap in question, the one which is prohibited by the Service's revenue rulings, is that between commercial representation and PILF representation. If the PILF is not on the side of commercial counsel, no more need be said. If a PILF aligns itself with commercial counsel, however, it should have at the least the paper burden of showing how, if at all, the issues it is raising cannot be raised by the commercial bar. Such a requirement limits the reporting to the problem in the least intrusive fashion.⁵⁴⁹

Disclosure of the business interests of members of a PILF's board and litigating committees could be similarly tailored. Much of this disclosure would involve little more information than is already contained in a PILF's annual report.⁵⁵⁰ But the lateral connections of these individuals are also important—their memberships on other corporate boards, and, with respect to members of litigation committees, an identification of their corporate clients, individually and those of their law firms. In another context, representation by the firm itself would raise questions of conflict of interest under the canons of ethics.⁵⁵¹ Here, the clients of the law firm represent those interests which could affect the case selection of a PILF.⁵⁵² By way of analogy, if the mere *possibility* of recovering attorneys' fees at an indefinite point in the future might so affect case selection by a PILF as to require close supervision by the IRS,⁵⁵³ then the *actual presence* of

548. See Rev. Rul. 75-75, 1975-1 C.B. 154 (PILF charging clients fees not exempt under § 501(c)(3)); Rev. Rul. 75-76, 1975-1 C.B. 154 (PILF may accept court- or agency-awarded fees and remain exempt under § 501(c)(3)); Rev. Rul. 76-5, 1976-1 C.B. 146 (PILF loses exemption under § 501(c)(3) if it employs private attorney on salaried basis and also pays him court-awarded fees). It does seem anomalous that while the Service's fee restrictions stem from the possibility of an improper commercial motive, the more obvious possibility of a commercial motive in contributions to the business PILFs would have been so long overlooked.

549. Without such reporting, the Service's requirement that PILFs raise only issues inadequately represented by the private bar will remain largely illusory. There will be little information to prompt an IRS audit, and no record to start with were an audit to begin. The additional information would save time and effort, at minimal cost to those few operating PILFs which would find themselves so often aligned with the commercial bar that reporting could be considered an imposition.

550. Indeed, these reports often contain brief biographical sketches of their board members highlighting their business and industry credentials.

551. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 5-101(A) (1981).

552. The "private inurement" question of influencing case decisions is more a "marriage" of interests than a "conflict," but in the PILF context, the situation raises much the same problem.

553. See *supra* note 548.

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an interested client in the firm of a PILF decisionmaker should likewise at least come to the Service's attention.

The last and most potentially troublesome area of reporting is information on those private donors who could benefit from litigation brought by a PILF. Under current requirements, little information of this type is required and there is a correspondingly small basis for the Service to make even an inquiry as to whether the prohibited activity—*influence of case selection*—is taking place. As we have seen, in almost all of the PILFs studied, there is at least a strong suggestion, and with some, strong evidence, that it does take place. Yet the confidentiality of sources of funding is one of the most prized attributes of all public charities. This confidentiality goes to the very existence of charities, and mandatory disclosure may compromise First Amendment guarantees of freedom of association and expression.⁵⁵⁴ Counterbalancing these considerations is the Service's obvious need for information of some sort in order to supervise the appropriateness of exemptions.

These competing interests call for disclosure of the minimum information necessary to do the job. One approach would be to lower the "two percent of gross revenue" threshold for major donors. As things currently stand, a corporation may give up to \$50,000 annually to a firm the size of the Pacific Legal Foundation—excluding additional contributions from corporate officers and associated corporate foundations—without these contributions and their possible connection to a PILF's docket appearing on the PILF's return. The case for disclosure is no less strong for PILFs of a smaller size, for which a just less than two percent contribution of, say, \$5,000, may mean the difference between pursuing a particular action or not. For these reasons, a one-half of one percent threshold seems more appropriate.⁵⁵⁵ There are, however, drawbacks to such a proposal. On the one hand, even contributions below one half of one percent may remain influential. On the other hand, such a requirement may be over-broad in its reporting burden and its potential for abuse.

A second approach would be to impose an affirmative duty on the PILF to declare the financial interest of any major donor (for example, \$1,000 or one half percent, whichever is the smaller)—or of any member

554. See *NAACP v. Alabama*, 357 U.S. 449 (1958) (freedom of association protects NAACP membership lists from state scrutiny). Working against disclosure is the spectre that not only might other organizations raid the contributor lists of successful PILFs, but that undue pressure—government, corporate, or otherwise—could be applied against donors to a PILF whose activities were considered unpopular. Cf. *id.* at 462–63 (discussing private harassment and "interplay" of state and private actions).

555. It goes without saying that a lowered threshold does not prohibit, or even question, the propriety of major donations. It serves merely to flag those financial interests which may be influencing a PILF's choice of suits. The Service has recognized the need for this type of information with its "two percent" rule. The question raised here is simply whether two percent is not much too accommodating to reveal the kinds of influence at work.

of its board or of any client of the firm represented on the litigation committee member for that matter—in any case or proceeding the PILF entered. This approach has the advantage of being more selective and less likely to lead to abuses—either through raids on contributors or by undue pressure on them—by other organizations or the government. It carries the disadvantage, however, of relying primarily on the willingness and thoroughness of the PILF to reveal the very interests which may be influencing its decisions.

These recommendations for reporting and disclosure are not pretended to be exclusive. They do, from the experience of this study, include information that the Service will need if it is to supervise those requirements it has announced and affirmed for more than a decade for the practice of public interest law.

B. *Altered States: Qualification of the Business PILFs Under More Appropriate Tax-exempt Categories*

Were an audit of the studied PILFs conducted along the lines just indicated, it seems inescapable that serious questions would arise concerning their continuing qualification as public charities under section 501(c)(3). This is not to suggest that the representation of business interests has no place in the courtroom. Nor is it to suggest that business points-of-view are not entitled to constitutional protection,⁵⁵⁶ or even to disparage the availability of tax exemption under the Code. It does, however, suggest that an effort should be made to find a better fit.

1. *Qualification Under Sections 501(c)(4) and 501(c)(6)*

As a starting point, no tax exemption should be available to firms organized to represent the interests of specific business members or contributors. As important as such representation is to the adjudication of legal issues, that function is the *raison d'être* of the private bar.⁵⁵⁷ The Service will allow considerable indirect inurement to donors and directors of section 501(c)(4) and (c)(6) organizations so long as a “primary,” collective benefit is identifiable beyond them.⁵⁵⁸ The section 501(c)(4) category seems appropriate for these firms, if only because of the Service’s expan-

556. See *First Nat'l Bank v. Bellotti*, 435 U.S. 765 (1978).

557. This observation should apply equally to groups of businesses advocating their mutual economic interest. Collective financing agreements are common among business groups for representation on issues of common concern; major firms commonly represent these concerns before courts and government agencies. (For example, the law firm of Hunton & Williams of Richmond, Virginia, regularly represents the interests of large utility associations and companies before the federal courts. See *National Wildlife Fed'n v. Gorsuch*, 693 F.2d 156 (D.C. Cir. 1982)). Even the more expansive tax-exempt categories under § 501(c) providing for civic leagues and for trade associations disqualify activities which benefit primarily the individual members and contributors to such an organization.

558. See *supra* pp. 1431, 1433.

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sive, “anything-not-bad” concept of “social welfare” for (c)(4) organizations.⁵⁵⁹ Furthermore, treasury regulations specifically provide for the classification of an organization under section 501(c)(4) if it has failed the more stringent section 501(c)(3) criteria.⁵⁶⁰

Section 501(c)(6) provides an even more logical niche. Due to the diverse nature of the businesses that support them, it is unlikely that these PILFs would qualify under the “single line of business” test for tax-exempt business leagues.⁵⁶¹ No reason comes to mind, however, why they do not qualify in the same fashion as the litigating arms of chambers of commerce, which are defined geographically rather than by lines of trade. For those PILFs that are national in scope there is an obvious analogy to the United States Chamber of Commerce. For those firms focused more regionally, the geographic test is as satisfied as it is for local and regional chambers. Supporting this analogy is the fact that chambers of commerce, both nationally and locally, have been primary movers in the creation and support of the business PILFs. Moreover, the U.S. Chamber of Commerce maintains its own litigating organization, the National Chamber Litigation Center (NCLC), which brings lawsuits on behalf of the Chamber’s interests generally and those of its individual members and contributors.⁵⁶² A look at the NCLC shows a striking similarity to the business PILFs.

2. *The National Chamber Litigation Committee: A Litigation Model for the American Business Community*

Their brief complemented ours and augmented the arguments we made. They raised our credibility level. In fact, there is no doubt in my mind that we appeared in a better light before the court as a result of their involvement.

Senior Vice President,
Georgia-Pacific Corporation⁵⁶³

The U.S. Chamber of Commerce was slow to react to the the Powell Memorandum of 1971.⁵⁶⁴ It was not until 1977 that the Chamber, ob-

559. See, e.g., *Senate Hearings supra* note 18, at 172 (statement of Arnold & Porter) (stating before the Senate Subcommittee on Employment, Manpower and Poverty that: “Although the § 501(c)(4) category came into the statute in 1913, no stable concept of the scope of this provision has been developed by the Service in the intervening years. Indeed, in practical application it has largely become a dumping ground for organizations which failed to qualify under § 501(c)(3), but were sufficiently acceptable as engaged in ‘social welfare’”).

560. Treas. Reg. § 1.501(c)(3)-1(c)(v) (1960).

561. See *supra* p. 1432.

562. The Chamber has, notably, not requested § 501(c)(3) status for NCLC, apparently on the premise that it would not be eligible.

563. NCLC, Business is Our Only Client (undated fundraising literature).

564. See *supra* pp. 1457–58 (discussing Powell memorandum). The Chamber’s response was not

serving that "business can lose its collective shirt" in ways which "can be countered only through the courts,"⁵⁶⁵ created the NCLC under section 501(c)(6) of the Code to represent "businesses' point of view before the courts and regulatory agencies on issues of broad and critical importance to the business community."⁵⁶⁶

The similarity to the business PILFs in these stated goals extends also to funding and organization. Initial funding and logistical support were provided directly by the Chamber.⁵⁶⁷ The support has since broadened to include contributions from state and local chambers of commerce, trade associations, corporations, and a few individuals.⁵⁶⁸ NCLC's legal staff, of four attorneys at its watershed,⁵⁶⁹ represents the Chamber with the occasional assistance of counsel in private firms on an *ad hoc* basis. NCLC cases are screened by one of two legal affairs committees before approval by the President, the Labor Law Advisory Committee, and the Constitutional and Administrative Law Committee, composed of corporate counsel for such familiar corporations as Sears, General Motors, General Electric, U.S. Steel, and Shell Oil, and members of private law firms representing major corporate clients.⁵⁷⁰

The similarity between NCLC and the business PILFs is reflected also in their dockets.⁵⁷¹ The Chamber takes on more labor-management con-

limited to litigation. The Chamber also stepped up its legislative program and launched a strong public information campaign. *See, e.g.*, U.S. Chamber of Commerce, News Release (Oct. 11, 1982) (reporting on articles published by Chamber attacking "partisan" nature of environmental movement).

565. Chamber of Commerce of the United States, *The National Chamber Litigation Center: Serving Business on the Legal Scene 3* (unpublished report 1978) [hereinafter cited as NCLC Statement].

566. *Id.* NCLC described its goals as being:

To challenge senseless, irresponsible laws and regulations on a national scale. To tackle restrictive anti-business activity in labor relations, consumer affairs, trade regulations, constitutional law, administrative law and environmental law. To conduct needed legal research to provide members with useful and accurate information on legal issues affecting the business community. To provide programs which offer members a forum for discussing legal concerns.

To act as a national legal advocate for the business community on matters of public policy.

Id. This study examines parallels between the Chamber's litigation programs and those of the business PILFs. The National Chamber is not, however, the only Chamber engaged in litigation. Regional and local chambers have established tax-exempt firms to represent their interests. *See, e.g.*, Amicus Curiae Brief of the Chamber Legal Center, *Avoyelles Sportsman's League v. Marsh*, No. 82-3231 (5th Cir. 1982).

567. Singer, *Liberal Public Interest Law Firms Face Budgetary, Ideological Challenges*, Nat. J., Dec. 8, 1979, at 2055.

568. NCLC Statement, *supra* note 564. Contributions range from \$250 to \$12,000. *See* NCLC, Fact Sheet (undated). A budget of \$300,000 in 1978 grew to \$444,000 in 1979, and appears to have stabilized at about \$400,000 a year. Telephone interview with Stanley Kaleczyc, NCLC attorney (Nov. 22, 1983).

569. NCLC's legal staff is presently down to three attorneys. Interview with Stanley Kaleczyc, *supra* note 567.

570. Singer, *supra* note 567, at 2055. Currently, both U.S. Steel and Sears, Roebuck are on NCLC advisory committees. NCLC, *The Business Advocate*, Summer 1983, at 8 (newsletter). Both corporations have been active contributors to the business PILFs as well.

571. This study does not perform the same analysis on NCLC's docket that it performed for the

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troversies, but includes a familiar range of energy, environmental, and corporate rights issues as well. Not infrequently, Chamber briefs are found side by side with those of the Pacific Legal Foundation, the Mountain States Legal Foundation, and their progeny in these cases, particularly at the U.S. Supreme Court level. Almost all of the Chamber's appearances in litigation are as *amicus curiae*, reflecting its relatively modest level of investment from the business community, a level which may be understandable when compared to businesses' available alternative, investing in a section 501(c)(3) business-sponsored PILF.

The Chamber and NCLC appeared in thirty-two reported decisions of the U.S. Supreme Court between 1978 and 1983. Of these, twenty-three cases involved alleged employment discrimination, termination, maternity leave, benefits, collective bargaining, and similar labor-management issues. This category also saw entries by the New England Legal Foundation,⁵⁷² the Washington Legal Foundation,⁵⁷³ and the Pacific Legal Foundation.⁵⁷⁴ Another four Chamber of Commerce cases raised such energy and environmental issues as nuclear power regulation, retail gasoline services, and health standards for cotton dust and for benzene in the workplace; two of the Chamber briefs here were accompanied by briefs from the Pacific and Capital Legal Foundations.⁵⁷⁵ The Chamber also appeared in four cases favoring corporate rights to promotional speech, to political speech, and to resist investigation by OSHA and the IRS. The business PILFs also filed briefs in each of these cases,⁵⁷⁶ as they did in the Chamber's last case, which alleged discrimination in education.⁵⁷⁷ In all, no less than ten Supreme Court cases found briefs from both the Chamber of Commerce and business PILFs. It should go without saying that all Chamber appearances and all legal foundation appearances were on behalf of the corporate litigants.⁵⁷⁸

business PILFs because there is no question of contributors and potential overlapping interests. What is at issue is the nature of the cases undertaken, and their similarity to those undertaken by these PILFs.

572. *NRLB v. Transportation Management Corp.*, 103 S. Ct. 2469 (1983).

573. *First Nat'l Maintenance Corp. v. NLRB*, 452 U.S. 666 (1980); *Carbon Fuel Co. v. United Mine Workers*, 444 U.S. 212 (1979). The Washington legal foundation is a business sponsored PILF located in Washington, D.C.; it was not considered in this study because it has not been allied with the National Legal Center for the Public Interest or the other legal foundations.

574. *Geduldig v. Aiello*, 417 U.S. 484 (1974).

575. *Exxon v. Governor of Maryland*, 437 U.S. 117 (1978) (Pacific Legal Foundation); *Industrial Union Dep't v. American Petroleum Inst.*, 448 U.S. 607 (1980) (Capital Legal Foundation).

576. *Upjohn Co. v. United States*, 449 U.S. 383 (1981) (attorney-client privilege in IRS investigation) (New England Legal Foundation); *Consolidated Edison Co. v. Public Serv. Comm'n*, 447 U.S. 530 (1980) (political inserts in monthly bills) (Mid-Atlantic Legal Foundation, New England Legal Foundation, Washington Legal Foundation); *Marshall v. Barlow's, Inc.*, 436 U.S. 307 (1978) (warrantless searches by OSHA) (Mountain States Legal Foundation); *First Nat'l Bank v. Bellotti*, 435 U.S. 765 (1978) (corporate expenditures on referenda) (Pacific Legal Foundation).

577. *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978). (affirmative action in admissions) (Pacific Legal Foundation).

578. NCLC's docket and its relationship to the other legal foundations is shown in the following

The Chamber's litigation is not examined here in the detail afforded that of its tax-exempt counterparts. Issues of business influence and representation by the private bar are not relevant to an organization which does not claim to be a public interest firm free of such influence. The Chamber, however, does provide a candid model of what it considers to be, upfront, litigation on behalf of American business. Although the Chamber has carved something of a niche in labor law, the niche is by no means exclusive.⁵⁷⁹ The business PILFs have also been active in labor-management litigation; the Chamber appears in corporate energy, environmental and other business litigation. The fact is that the Chamber and the business PILFs are doing largely the same things in the same ways.⁵⁸⁰ Those corporate positions which the Chamber is supporting because they frankly support corporations, the business PILFs are supporting for "the well-being of the free-enterprise system." As a legal matter, the rhetoric is irrelevant. The question under section 501(c)(3) is simply whether the

chart:

Type of Issue	Number of NCLC Briefs	Number of Briefs Filed by Legal Foundations
Labor	23	Pacific—1 New England—1 Washington—2
Energy & Environment	4	Pacific—1 Capital—1
Other Corporate Rights	4	Mountain States—1 Pacific—1 Mid-Atlantic—1 New England—2 Washington—1

In lower federal court cases, the Chamber's emphasis on labor issues becomes even more pronounced, although it is by no means exclusive. Of 33 cases at the district and appellate level, 28 involved labor practices or management challenges to labor law requirements. NCLC's participation in the five other cases supported corporate positions against the FEC, the SEC, the EPA, and OSHA. Even with the larger pool of cases, the overlap with entries from the legal foundations diminishes but does not disappear. In *NRDC v. SEC*, 606 F.2d 1031 (D.C. Cir. 1979), for example, both the Southeastern Legal Foundation and the Chamber of Commerce filed amicus briefs. It also bears mention that in at least one case the Chamber intervened as a party litigant. See *Francis v. Davidson*, 379 F. Supp. 78 (D. Md. 1974). This participation removed whatever theoretical distinction might have arisen from the Chamber's predilection for participation as an amicus. The business PILFs themselves have appeared as amicus curiae in almost two-thirds of their cases. See Appendix I.

579. The overlap in labor law is most pronounced between the Chamber and the National Right to Work Committee, another business-sponsored organization granted exemption under § 501(c)(3).

580. Beyond similarity of purpose, funding, and docket, there is also evidence that the NCLC coordinates its activities on occasion directly with the business PILFs. A Chamber attorney explained that the overlap between his § 501(c)(6) organization and the § 501(c)(3) business PILFs did not bother him, although "we may be a little more honest in our representations." He continued: "We have cordial relationships [with the business PILFs] and communicate to avoid duplication of efforts. Avoidance of duplication is important now because of limited funding." Telephone interview with Stanley Kaleczyc, NCLC attorney (Oct. 26, 1982).

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corporate position in these cases was so inadequately presented by the corporate litigants, among the largest and best financed in the nation, as to warrant additional, public interest representation.

The NCLC indicates an appropriate tax-exempt category for an organization that litigates primarily on behalf of the business community at large: section 501(c)(6). This section is the most logical category, on the basis of their records, for the business PILFs. As common sense tells us in making the classifications of our everyday lives: If it walks like a duck, quacks like a duck, has feathers, and is frequently found with the other ducks . . . we place it with the ducks.

3. *The Effect of Re-qualification*

The legal effect of qualification under sections 501(c)(4) or (c)(6), as opposed to section 501(c)(3), is, of course, the unavailability of deductions to donors for their contributions. Given the nature of the contributors, this reclassification may not have a significant economic impact either on those corporate donors which can afford to forgo the deduction, or on others which will simply take the deduction as a necessary business expense.⁵⁸¹ Reclassification may have a more significant effect on eligibility for special postal privileges, particularly for those firms which are involved in direct mail fundraising,⁵⁸² and on the donation requirements for private foundations.⁵⁸³ But as Michael Horowitz has explained, the deductibility of contributions is not the purpose behind qualification of these firms as public charities under section 501(c)(3). The purpose is an ideological counterforce to the perceived anti-business points of view advocated by the civil rights, consumer, and environmental public interest law firms. Viewed more broadly, the quest is for legitimacy in the minds of educators, legislators, the press, the courts, and the general public. An advantage in all of these areas goes to the ones wearing the white hats.

The ideology of American business is as valid as any other and deserves a full hearing, among other places, before the courts. The problem is that not all valid points of view are entitled to tax deductions for their appearances in court: only the ones which would not otherwise appear. As a general rule, private business is fully capable of presenting its views. It purchases billions of dollars in advertising annually for this purpose. It employs thousands of members of the private bar. If a more generalized voice-of-business is needed, this is the accepted role of Chambers of Commerce in the field, and of section 501(c)(6) in the Code.

581. The availability of a business expense deduction, rather than a charitable contribution deduction, will depend on how directly the PILF's activities serve the interest of the donor. *See supra* note 141.

582. *See supra* note 45.

583. *See supra* note 42.

C. *Reaching the Altered State: Questions of Standing*

Assuming *arguendo* either that one or more of the business PILFs examined in this study are improperly qualified as public charities under section 501(c)(3) of the Code, or that there is at the very least a more appropriate exempt category for them under either sections 501(c)(4) or (c)(6), the question arises whether anyone besides the Internal Revenue Service could compel the indicated change in exempt status.⁵⁸⁴ Congress, of course, could amend section 501(c)(3) to identify eligible and ineligible public interest law practices. Given the complexity and political sensitivity of these issues, Congress is highly unlikely to enter this field.⁵⁸⁵ Furthermore, even were Congress to risk codifying some concept of public interest law, it is even more unlikely that it could do more than enact the Service's current tests, leaving the Service with the same responsibility it has now to interpret and apply them. Any challenge, then, would have to look to the courts. It would in all probability founder, at the threshold, on the judicial doctrine of standing.

1. *Falling over Standing*

The constitutional basis for standing derives from Article III, section 2, which limits the judicial power to "cases" and "controversies."⁵⁸⁶ The doctrine rejects lawsuits that are not sufficiently adversarial to focus issues for decision, retaining those where the plaintiff has a "personal stake in the outcome of the controversy."⁵⁸⁷ The Administrative Procedure Act offers standing to persons "adversely affected" by agency action "within the meaning of a relevant statute."⁵⁸⁸ While the Supreme Court has recently focused on the Act's adverse affect ("injury in fact") requirement with widely varying results,⁵⁸⁹ standing to challenge benefits conferred on an

584. This question assumes as well that the affected organizations, because of the benefits received, would be the last to seek such a change in status.

585. Charitable organizations, as a body, comprise a formidable lobby in Washington, D.C. The support for public interest law firms as a charitable class has also been demonstrated. *See supra* TAN 116-32.

586. For a discussion of the development of the doctrine of standing, see K. DAVIS, ADMINISTRATIVE LAW 97-119 (6th ed. 1977); 13 C. WRIGHT, A. MILLER & E. COOPER, FEDERAL PRACTICE & PROCEDURE § 3531 (1975 & Supp. 1977). Criticisms of the standing limitations can be found in Sedler, *Standing and the Burger Court: An Analysis and Some Proposals for Legislative Reform*, 30 RUTGERS L. REV. 863, 873-76 (1977); Tushnet, *The New Law of Standing: A Plea for Abandonment*, 62 CORNELL L. REV. 663 (1977).

587. *See* Warth v. Seldin, 422 U.S. 490, 498 (1975).

588. 5 U.S.C. § 702 (1982). Early Supreme Court cases construed these terms liberally. *See, e.g.*, Association of Data Processing Serv. Orgs. v. Camp, 397 U.S. 150 (1970) (data-processing firm may sue agency ruling that banks do not violate banking laws by providing data processing); Barlow v. Collins, 397 U.S. 159 (1970).

589. In Eastern Ky. Welfare Rights Org. v. Simon, 426 U.S. 26 (1976), an organization advancing the interests of users of free hospital services challenged an IRS rule change for exempt hospitals which allowed reductions in these services. The Court could neither find that the alleged injury (denial of services) had been caused by the Treasury ruling (according to the Court, the hospitals might

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exempt organization has been almost uniformly denied.⁵⁹⁰ This strict application of the standing requirement appears to bend, however, in the presence of claimed violations of constitutional rights.

In *Green v. Kennedy*, plaintiffs challenged the tax exemption for private schools that excluded black students on the basis of race.⁵⁹¹ The plaintiff parents had alleged no attempt to enter or use the segregated schools. They alleged no discrimination against their children by these schools. As the appellate court recognized, “the sole injury they claim is the denigration they suffer as black parents and school children when their government agrees with the tax exempt status of educational institutions in their communities that treat members of their race as persons of lesser worth.”⁵⁹² For the majority, this was enough. Given the grievance alleged, it was unnecessary to trace either a cause or a cure from the

have denied these services anyway), nor that the injury could be cured by courts (as the hospitals were free to abandon their exempt status, and continue to deny the services). *Id.* at 42–44. In *Duke Power Co., v. Carolina Envtl. Study Group*, 438 U.S. 59 (1978), homeowners challenged the constitutionality of the Price-Anderson Act, which limits the liability of nuclear-plant owners. The plaintiffs alleged that they would not be put at risk from the hazards of nuclear energy but for the plants which, in turn, would not have been built but for the Act. *Id.* at 69, 74–75. Six Justices had little difficulty tracing this “chain of causation” through its probabilities (despite the fact that the plants were free to operate without the Price-Anderson Act) and across the Article III threshold. *Id.* at 74–77. What one is to make of these formulations for standing has been the subject of commentary, and of at least some suspicion that the newly articulated principles can be manipulated to accept, or reject, virtually any case desired, see *Duke Power Co.*, 438 U.S. at 103 (Stevens, J., concurring) (“It is remarkable that such a series of speculations is considered sufficient either to make this litigation ripe for decision or to establish appellees’ standing [W]henever we are persuaded by reasons of expediency to engage in the business of giving legal advice, we chip away a part of the foundation of our independence and our strength.”).

590. For a thoughtful discussion of standing in suits contesting the tax status of third party organizations, see Asimow, *Standing to Challenge Lenient Tax Rules: A Statutory Solution*, TAXES, Aug. 1979, at 483. Reviewing the case law as of 1979, Professor Asimow concludes “It now seems unlikely that anyone has standing under present law to challenge favorable tax treatment accorded to someone else,” *id.* at 491, and proposes a federal statute to remedy the difficulty, *id.* at 491–503. See *United States v. Richardson*, 418 U.S. 166 (1974) (denying standing to taxpayer asserting that secrecy of CIA expenditures violated art. I, § 9, cl. 7, requiring public accounting of governmental expenditures); *Schlesinger v. Reservists Comm. to End the War*, 418 U.S. 208 (1974) (denying standing to taxpayers and citizens opposing armed forces Reserve membership of Congressmen as violating incompatibility clause, art. I, § 6, cl. 2, and allowing undue executive influence on taxing and spending decisions).

591. 309 F. Supp. 1127 (D.D.C.) (three-judge court), *appeal dismissed sub nom.* *Cannon v. Green*, 398 U.S. 956 (1970). Faced with motions to dismiss based on standing, a three-judge court resolved the issue in an order for preliminary injunction with the simple declaration that the parents “have standing to attack the constitutionality of statutory provisions which they claim provides an unconstitutional system of benefits . . . that fosters and supports a system of segregated private schools.” 309 F. Supp. at 1132. In 1976, the case was re-kindled by the same plaintiffs as an action to enforce the prior injunctive order. Shortly thereafter, the parents of black children attending public schools in eight other states filed a separate lawsuit seeking a similar order and relief nationwide. Resolution of these two cases was delayed at first by IRS proposed guidelines conforming its policies to the earlier court order, and subsequent riders to the Treasury Department’s appropriations bills prohibiting the use of funds to carry out these guidelines. See *Wright v. Regan*, 656 F.2d 820, 823–26 (D.C. Cir. 1981) (summary of events). In 1980, the district court granted the relief sought in the reopened litigation and dismissed the action brought by the other parents in other stated for, *inter alia*, lack of standing. *Wright v. Miller*, 480 F. Supp. 790, 793–94 (D.D.C. 1979).

592. *Wright v. Regan*, 656 F.2d 820, 827 (D.C. Cir. 1981), *cert. granted*, 103 S. Ct. 3109 (1983).

government exemption to the practice of the schools to the injury. "The very act by the IRS of according tax exemption to a school that discriminates in their vicinity causes immediate injury to them, plaintiffs maintain, and that is the only injury for which they seek redress."⁵⁹³

Claims under the First Amendment have been favored in the same fashion.⁵⁹⁴ In 1982, a range of individuals and organizations challenged the exemption of the Roman Catholic Church and its member churches for violation of the Code's prohibitions on lobbying and political campaign activity.⁵⁹⁵ Plaintiffs alleged that the Church was engaged in a nationwide plan to change abortion laws through legislative influence and participation in elections. By contrast, no charity with opposing views on abortion was permitted to support legislation and candidates on the issue.⁵⁹⁶ Observing that the allegation of a First Amendment violation does not *per se* confer standing on litigants,⁵⁹⁷ the Court rejected various individual plaintiffs and groups whose interests were essentially ideological,⁵⁹⁸ not rising above the "whistleblowing" discounted in earlier cases.⁵⁹⁹ For an organization which provided counseling services for pregnant women, however, and for several "clergy plaintiffs," leaders of other churches which compelled consideration of abortion as part of their ministry, the court found that the challenged exemption "diminishes their position in the community, encumbers their calling in life, and obstructs their ability to commu-

593. In so ruling, the court relied on *Norwood v. Harrison*, 413 U.S. 455 (1973), where parents of black school children in the *public* schools system sought to enjoin a Mississippi state program of lending books to, *inter alia*, segregated *private* schools. Writing for the Supreme Court, the Chief Justice had found no "causal" proof necessary that white school children would re-enroll in the integrated public school system were the loans to stop: "the Constitution does not permit the State to aid discrimination even when there is no precise causal relationship between state financial aid to private school and the continued well-being of that school." *Id.* at 465-66.

594. This treatment is presaged by Justice Stewart's brief concurring opinion in *Eastern Kentucky Welfare Rights Organization*: "I add only that I cannot now imagine a case, *at least outside the First Amendment area*, where a person whose own liability was not affected ever could have standing to litigate the federal tax liability of someone else." 426 U.S. at 46 (Stewart, J., concurring) (emphasis added). It should be noted that the majority opinion in *Eastern Kentucky Welfare Rights Organization* did not close the door to litigation challenging the exempt status of another organization: "We do not reach either the question of whether a third party ever may challenge IRS treatment of another, or the question of whether there is a statutory or an immunity bar to this suit." *Id.* at 37 (majority opinion).

595. *Abortion Rights Mobilization v. Regan*, 544 F. Supp. 471 (S.D.N.Y. 1981).

596. Plaintiffs initially offered four constitutionally derived bases for standing: the establishment clause of the First Amendment, the equal protection clause of the Fifth Amendment, "voter standing," and "tax payer standing." *Id.* at 476. The plaintiffs withdrew the final ground for standing before the district court filed its opinion. *Id.* at 476 n.1. Like "taxpayer standing," "voter standing" is not available to challenge PILF exemptions.

597. "[O]ffense to one's sense of fidelity to separatist principles is an insufficient injury to bring suit for an alleged establishment clause violation." *Id.* at 477 (citing *Valley Forge Christian College v. Americans United for Separation of Church & State*, 454 U.S. 464 (1982); *Doremus v. Board of Educ.*, 342 U.S. 429 (1952)).

598. These entities included individual members of the church who objected to its practices and pro-choice groups which provided medical aid and other services to women seeking abortions. 544 F. Supp. at 478-79.

599. *Id.* at 480.

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nicate effectively their religious message.”⁶⁰⁰ This injury sufficed: “The granting of a uniquely favored tax status to one religious entity is an unequivocal statement of preference that gilds the image of that religion and tarnishes all others.”⁶⁰¹

From these cases, a narrow window of uncertain dimensions appears in the otherwise formidable barrier to standing to question the tax status of a third party organization. Through this window claims based on particularized economic injury or constitutional rights may be admitted. Neither would easily accommodate a challenge to the tax-exempt status of a business PILF. A section 501(c)(6) chamber of commerce litigation center for example, which is not qualified to receive contributions deductible under section 170 to its donors, might claim injury in its competition with the business PILFs for donors within the same pool of corporations and individuals.⁶⁰² A more fanciful plaintiff might be any *non-business* PILF which could allegedly raise more money by forging a similar alliance with corporate interests, in turn for a sympathetic ear on the PILF’s litigation agenda. The chamber plaintiff, however, would find it difficult to prove that disallowing the business-PILF exemptions would “cure” its problems to the degree required.⁶⁰³ The PILF plaintiff would face an even more speculative chain of causation, and pre-emption by another remedy: a prospective ruling on the desired degree of corporate influence,⁶⁰⁴ followed by declaratory, judicial review.⁶⁰⁵

It thus appears unlikely that a plaintiff could establish standing without an additional allegation of injury rising to constitutional proportions. The shape of such a claim is not easily perceived. No abridgment of civil rights

600. *Id.*

601. *Id.* The same opinion, by contrast, found no standing—whatever under the alleged violations of the Fifth Amendment’s equal protection clause. Plaintiffs alleged no discrimination against *their* interests: “Their acknowledgement that the Code has been applied properly to them concedes that they have not been injured, in purely fifth amendment terms, by the alleged misapplication to the church defendants.” *Id.* at 483. In the court’s view, the plaintiffs were not being mistreated; they were merely asserting that the government was disregarding the law with regard to someone else. *But see* *Regan v. Taxation with Representation*, 103 S. Ct. 1997 (1983). There, the Court accepted the standing of a plaintiff § 501(c)(3) organization for an equal protection challenge of exemptions of, and deductions for donors to, veterans’ organizations. The alleged inequality concerned a limitation on lobbying for § 501(c)(3) groups, while the veterans’ organizations under § 501(c)(19) are allowed to lobby without restriction. Although the Court rejected the claimed inequity on the merits, it in fact reached the merits without finding an impediment in the standing doctrine.

602. Arguably, the injury is here tangible and particularized: The donor dollar is the lifeblood of these organizations, and the competitive quest for it is empirical, as are the advantages to the organizations qualified under §§ 501(c)(3) and 170, both in terms of the deductions available to donors and the more desirable corporate image of “public interest” contributions.

603. *See* *Simon v. Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26 (1976); *American Soc’y of Travel Agents* 566 F.2d 145 (D.C. Cir. 1977), *cert. denied*, 435 U.S. 947 (1978); *see also* *Tax Analysts & Advocates v. Blumenthal*, 566 F.2d 130 (D.C. Cir. 1977) (no standing for independent U.S. oil company to challenge IRS tax credits for payments by large U.S. companies to foreign governments), *cert. denied*, 434 U.S. 1086 (1978).

604. *Treas. Reg. § 601.201(a)(1)* (1967).

605. *I.R.C. § 7453* (1982).

or discrimination in the equal protection sense leap to mind.⁶⁰⁶ The closest one can come to the First Amendment might be freedom of speech, impaired by the government's imprimatur of "public interest" on entities which are not qualified for it, "denigrating" those firms which genuinely undertake to represent otherwise-unrepresented interests. The press, the court system, potential donors, and a watching public are thus made more cynical and more prone to look at *all* public interest firms as serving undisclosed, self-interests instead.

However accurate these allegations may be, they do not present the stuff of particularized injury. Were they sufficient to squeak over the Article III threshold, courts would reject the cases on "prudential" grounds as "beyond the zone of interest" protected by the Code, and beyond the competence of the courts to address and resolve.⁶⁰⁷ As well they should. The specter of all-out warfare among public interest groups with strongly-felt and directly-opposing ideologies, each able to challenge another's tax-exempt qualifications, is an unsettling one.⁶⁰⁸ The potential for abuse of the judicial process is obvious. Absent then the most clearcut violations of IRS requirements—alleged involvement in political campaigns, for example—the problem seems to be best left to of the Service itself. If a prod is necessary, there are other, less drastic mechanisms through the oversight committees of the Congress, investigations by the Government Accounting Office,⁶⁰⁹ the press, and, just perhaps, analysis by concerned scholars and members of the bar.

2. *Standing as a Sword*

Southeastern's representation of the public interest includes the representation of the several hundred individuals which contribute financially to Southeastern.

Brief of the Southeastern Legal Foundation⁶¹⁰

PLF, its members, supporters, and contributors would derive substantial benefit from the air pollution planning, construction of sew-

606. *But see* Regan v. Taxation with Representation 103 S. Ct. 1997 (1983).

607. Because of this negative conclusion on the prospect of standing, other potential barriers to litigation challenging the Service's exemption of a third-party organization, including the Anti-Injunction Act, the Service's "prosecutorial discretion," and sovereign immunity are not pursued further in this study. *See* Simon v. Eastern Kentucky Welfare Rights Organization, 426 U.S. 26 (1976).

608. For a strong and recent statement of the Supreme Court's reluctance to review tax exemptions for charitable organizations representing "diverse indeed often sharply conflicting, activities and viewpoints," see *Bob Jones Univ. v. United States*, 103 S. Ct. 2017 (1983) (Powell, J., concurring).

609. The General Accounting Office, for example, has recently completed a study highlighting the Service's failure to monitor the activities of private foundations. This study has resulted in promises of a response by the Treasury Department. *See Tax Administration: IRS Fails to Collect Foundation-Related Data, GAO and Agency Agree, TAX'N & ACCTG.* (BNA), May 11, 1983, at 6-5.

610. Brief of Southeastern Legal Foundation Amicus Curiae, at 2, *United Steelworkers of America v. Weber*, 443 U.S. 193 (1979).

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age treatment facilities, and construction and maintenance of roads that would be financed by the Federal funds withheld from the State by the Administration.

Petition of the Pacific Legal Foundation⁶¹¹

While the concept of standing may preclude a third-party challenge to the tax status of the business PILFs, it does offer the opportunity to challenge the entry of these PILFs into specific litigation and to surface the financial interests behind them.

A PILF may satisfy the requirements for standing in one of three ways: as an organization, as the representative of its members,⁶¹² or as the attorney for an outside interest. Organizational standing is limited to the corporate body itself. Without a showing of economic injury,⁶¹³ PILFs of all persuasions have found this a difficult standard to meet.⁶¹⁴ Allegations demonstrating a strong organizational interests in the subject matter of a dispute, be they in wilderness or in a free market economy, have not sufficed. This restriction has been a particular problem for the business PILF.

Two suits under the Clean Air Act, *Pacific Legal Foundation v. Gorsuch*⁶¹⁵ and *Mountain States Legal Foundation v. Costle*,⁶¹⁶ challenged EPA requirements for state action to improve air quality in areas which had not attained national minimum standards. MSLF filed its action as an organization and on behalf of state legislators, adding somewhat more grandly as a plaintiff the "State of Colorado *ex. rel.* Mountain States."⁶¹⁷ PLF's petition alleged that "PLF, its members, supporters, and contributors, are vitally interested in maintaining a republican form of government for the State of California and a legislature that is free from unlawful coercion by unelected federal officials."⁶¹⁸ The petition, while not specifying who these "members" were, described the organization as follows:

Policy for PLF is set by an eighteen member Board of Trustees composed of concerned citizens who reside throughout the State of California and the States of Washington and Idaho. Thirteen of the eighteen member Board are attorneys. The Board evaluates the mer-

611. Petition of Pacific Legal Foundation, in *Pacific Legal Foundation v. Gorsuch*, 690 F.2d 725 (9th Cir. 1982) (withdrawn from bound edition).

612. See *Sierra Club v. Morton*, 405 U.S. 727 (1972).

613. Cf. *Consumers Union v. Kissinger*, 506 F.2d 136 (D.C. Cir. 1974) (organization which purchased steel to challenge administration efforts to reduce steel imports).

614. See *Sierra Club v. Morton*, 405 U.S. 727 (1972) (standing denied despite strong organizational interest in retaining natural character of an area proposed for development).

615. 18 Env't Rep. Cas. (BNA) 1127 (9th Cir. 1982).

616. 630 F.2d 754 (10th Cir. 1980).

617. *Id.* at 756-57.

618. 18 Env't Rep. Cas. (BNA) at 1131.

its of any contemplated action and authorizes such action only where the Foundation's position has broad support within the general community. The Board has approved the filing of this action.⁶¹⁹

The Ninth Circuit found this interest insufficient. As an organization, PLF "does not breathe the air in California, nor is its corporate health affected by what the Administrator has or has not done in California."⁶²⁰ The Mountain States appeal met a similar fate: "Neither petitioner, Mountain State Legal Foundation, nor the individual petitioner-legislators, has alleged a sufficient 'personal stake' in this controversy to entitle it to raise constitutional arguments on behalf of the State of Colorado."⁶²¹

The same difficulty arose in *Pacific Legal Foundation v. State Energy Resources Conservation and Development Commission*,⁶²² the firm's challenge to a California state law restricting the development of nuclear energy facilities.⁶²³ The action was brought on behalf of PLF, several San Diego-based associations, and a nuclear engineer who claimed that the law caused the loss of his job at the Sundance Nuclear Power Plant. The District Court found that these "general allegations of lost jobs and environmental harm" were "speculative," "conclusory," and "failed to demonstrate a concrete injury,"⁶²⁴ findings which were affirmed on appeal.⁶²⁵ In *Pacific Legal Foundation v. Watt*,⁶²⁶ PLF filed in an organizational capacity to contest the withdrawal of the Bob Marshall Wilderness Area from mineral entry. Although PLF quickly amended its complaint to add six "members and supporters" as plaintiffs,⁶²⁷ it argued its organizational standing separately to the court, to no avail. The Tenth Circuit could find no organizational injury.⁶²⁸

619. *Id.* at 1129.

620. *Id.* at 1131 (citation omitted).

621. 630 F.2d at 761.

622. 659 F.2d 903 (9th Cir. 1981).

623. For a fuller discussion of this case, see *supra* note 226.

624. 472 F. Supp. 191, 195 n.2 (S.D. Cal. 1979).

625. 659 F.2d at 909 (affirming 472 F. Supp. 191). The Ninth Circuit also found no standing for the nuclear engineer. *Id.* at 913.

626. 529 F. Supp. 982 (D. Mont. 1981).

627. *Id.* at 984 n.1.

628. In arguing to the contrary, PLF relied on *Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333 (1977) (standing found for non-membership trade association), and *Coles v. Havens Realty Corp.*, 633 F.2d 384 (4th Cir. 1980) (standing granted to non-profit organization formed to eliminate housing discrimination). PLF's reliance on these cases and the Court's disposition of them are revealing. *Hunt* involved a classic trade association. Its Board was de facto membership: "They alone elected, served on, and financed the Commission." 529 F. Supp. at 993. PLF could not argue *Hunt* too strongly without acknowledging that it was de facto a trade association as well, and similarly self-"served" with regard to its board and "membership." *Coles*, by contrast, involved an organization dedicated to achieving a specific, identifiable objective. Its standing to sue for violations of law affecting this objective was distinguished from that of PLF, whose goals were "not 'functional'" in the same way. *Id.* at 993-94. Once again, for PLF to claim that its goals were functional would either stretch the truth or admit it, neither choice a satisfactory one. In staking its claim as a public

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PLF has on one occasion established organizational standing, requiring some creativity and a forgiving court. In *Pacific Legal Foundation v. Goyan*, PLF challenged the Federal Food and Drug Administration regulations that would reimburse attorney's fees and costs of participants in that agency's proceedings.⁶²⁹ For standing, PLF asserted that the firm would suffer considerable economic costs from having to monitor the proposed reimbursement process, a proposition the Fourth Circuit found sufficient.⁶³⁰ Other circuits, and the Supreme Court, might look at such organizational injury—*injury-as-watchdog*—as at best a self-inflicted wound. Whatever the strength of this argument, it would not have availed the business PILFs in the preponderance of the cases examined in this study, which were not rule-makings over which the organizations could claim continuing “watchdog” interests. For these cases, and indeed for the reason PLF has tried so persistently to sue as an organization, associational standing comes into play.

While the Supreme Court has kept a tight lid on organizational standing, it has allowed wide latitude for organizations to represent their members. Herein lies a dilemma for the business PILFs. Several, by their very articles and bylaws, have no members.⁶³¹ Others declare a class of “members” which may or may not pass muster.⁶³² Even for those member inter-

interest law firm, PLF has forfeited its right to claim, for standing purposes, the single-mindedness of its “function” or the self-serving nature of its Board and “membership.”

629. 500 F. Supp. 770 (D. Md. 1980), *rev'd on other grounds*, 664 F.2d 1221 (4th Cir. 1981).

630. 500 F. Supp. at 773.

631. See *Mid-Atlantic Legal Foundation*, Bylaws Art. IV (“The Corporation shall not have members.”). See also *PLF v. Watt*, 19 Env't Rep. Cas. (BNA) 1602, 1603 (9th Cir. 1983) (PLF asserted standing through an affidavit of injury to one of its “member” trustees).

632. See *supra* p. 1532 (characterizing PLF's contributors as its “members” in *Pacific Legal Foundation v. Watt*). The Mountain States Legal Foundation amended its Articles of Incorporation in 1977 to provide two classes of members, individual and organization: “Any person, corporation, or other organization that pays the membership dues for the appropriate membership category shall become a member of the corporation.” MSLF Income Tax Return for 1978, Form 990, attachment (“Amendments to Article Four of the Articles of Incorporation”). While *Sierra Club v. Morton*, 405 U.S. 727 (1972), which denied an organization standing when *no* members were involved, implied that the Court would allow standing based upon injury to a single member, it did not define what that membership interest would have to be. A more recent case, brought by a business PILF not associated with the NLCPI firms, suggests that a narrow definition may be adopted. *Federal Election Comm'n v. National Right to Work Comm.*, 103 S. Ct. 552 (1982), turned on a provision of the Federal Election Campaign Act prohibiting corporations and labor unions from making certain expenditures on federal elections, 2 U.S.C. § 441b(a) (1982). The statute also provided, however, that organizations without capital stock could establish segregated funds for political activity, so long as these funds were solicited from the organization's “members.” *Id.* § 441b(b)(4)(c). The District of Columbia Circuit gave a broad construction to the term “members” and included 267,000 contributors to the organization in question. 665 F.2d 371 (D.C. Cir. 1981). Reversing, the Supreme Court required more:

Although membership cards are ultimately sent to those who either contribute or respond in some other way to respondent's [NRWC] mailings, the solicitation letters themselves make no reference to members. Members play no part in the operation or administration of the corporation; they elect no corporate officials, and indeed there are apparently no membership meetings. There is no indication that NRWC's asserted members exercise any control over the expenditure of their contributions. Moreover, as previously noted, NRWC's own articles of incorporation and other publicly filed documents explicitly disclaimed the existence of mem-

ests which do pass, the process of *demonstrating* standing will also begin to demonstrate the real interests in the litigation. In the few cases to follow this process to date, the results have been instructive. The joint action by PLF and MSLF to enjoin mineral withdrawals in the Bob Marshall Wilderness is a good example.⁶³³

As noted above, PLF brought this action in its own name but soon added six "members and supporters," each of whom held applications for oil and gas leases in the Bob Marshall area. While the court found that these individuals alleged sufficient economic injury to establish standing on their own behalves, their nexus to PLF was insufficient to establish standing for the firm.⁶³⁴ MSLF, however, was able to show that eight individuals who held "non-competitive lease applications to lands within the three wilderness areas" were its "members."⁶³⁵ Their injury was not a "generalized grievance"; the withdrawal "diminished the market value of their lease applications."⁶³⁶ While several of these "memberships" were open to question, at least one was not and that membership was sufficient. The result of this standing analysis was that PLF was out of the case, PLF's individual "supporters" were in, MSLF was in *via* its individual "members," and the common denominator for all, the only interest cognizable in the case, was the value of privately-held mineral leases. This fact revealed, the charitable nature of PLF and MSLF's representation becomes appropriately doubtful.

Similar revelations arise in other business PILF cases. The Southeastern brief quoted at the start of this section equates the firm's public interest with the "several hundred individuals who contribute financially to Southeastern."⁶³⁷ These individuals, as earlier seen, comprise a list of the largest corporate interests in the South. Similarly, in *Pacific Legal Foundation v. Gorsuch*, the described injury to the firm's "members, supporters, and contributors" lay in the loss of a "substantial benefit" from federally-subsidized public works programs.⁶³⁸ As also earlier described, PLF's challenge to public access requirements of the California Coastal Commis-

bers. We think that under these circumstances, those solicited were insufficiently attached to the corporate structure of NRWC to qualify as "members" under the statutory proviso.

103 S. Ct. at 558. Whether this same analysis will be applied to membership for purposes of standing remains to be seen. At least two courts, in opinions antedating *Federal Election Committee*, have so reasoned and ruled. See *Consumers Union v. Miller*, 84 F.R.D. 240 (D.D.C. 1979); *Health Research Group v. Kennedy*, 82 F.R.D. 21 (D.D.C. 1979). Until this issue is resolved, it remains something of an unexploded grenade for all public interest law organizations.

633. *Pacific Legal Found. v. Watt*, 529 F. Supp. 982 (D. Mont. 1981).

634. *Id.* at 990 (individual plaintiffs "supporters" not members of PLF).

635. *Id.* at 993 (MSLF has standing to represent members).

636. *Id.* at 990, 992.

637. Brief of Southeastern Legal Foundation as Amicus Curiae, *United Steelworkers v. Weber*, 443 U.S. 193 (1979).

638. *Pacific Legal Found. v. Gorsuch*, 690 F.2d 725 (9th Cir. 1982).

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sion was quickly distilled to the interests of a few private coastal landowners.⁶³⁹

Thus, the business PILFs are particularly vulnerable to challenges to their standing. Organizational standing will be rarely established. Membership standing will depend often on financial interests. These interests may not disqualify the business PILFs from litigation. The firms will continue to represent members and their investments where available, and those of outside parties where not.⁶⁴⁰ In the end, challenges to their standing act more as a searchlamp than a sword. They will rarely bar. They will cast a healthy light. At the least, they will educate the court in the case at hand and the public over time that what we have here is not litigation to vindicate a public interest, but a rather identifiably private and financial one instead. So long as the IRS unblinkingly accepts a PILF's direct representation of private elevator companies, mineral locators, real estate developers, the clients of its litigation committee members, and the corporate interests of its directors, this education may be the most that can be achieved.

D. *Reflections on Another Remedy: "A Plague on Both Your Houses"*

[I]f I could meet on the Potomac River on a raft in the middle of the night with the ambassador of our counterparts on the left, and if we could agree to sever our roles, I would unhesitatingly agree to such a treaty.

Michael Uhlmann, Director, NLCPI⁶⁴¹

One of the anomalies of the business PILFs is their view of "judicial activism."⁶⁴² Prominent founders, supporters, and directors maintain their opposition to an active judiciary while urging the business community to get into the game.⁶⁴³ Other spokesmen and supporters, however, call for

639. See *supra* pp. 1470-71.

640. Indeed, the trend may be for the business PILFs to forgo actions on their own behalf and represent business interest directly. According to one MSLF attorney, that organization is representing its "clients" in their own names now to avoid problems with standing. The clients in question were several ranchers in Western Colorado with grazing privileges on several thousand acres of public lands. Interview with Connie Brooks, attorney for MSLF (Dec. 1983).

641. Horowitz Report, *supra* note 301, at 31.

642. Judge Malcolm Wilkey of the D.C. Circuit Court of Appeals, was quoted in a recent NLCPI newsletter as saying:

'Judicial activism' has disrupted our well-designed Constitutional balance of separation of powers, brought disrespect to the judiciary, hampered the judiciary in performance of its legitimate tasks, shifted the highest governmental policy determinations to nonelected officials, and has been both caused by and caused evasion of responsibility by the legislative and executive branches.

NLCPI, Criminal Justice Reporter, Nov. 30, 1983, at 4.

643. See *infra* p. 1547.

the opposite remedy: to revoke the exemptions for *all* public interest "impact litigation," getting everyone out of the game.⁶⁴⁴

The premise for this approach has been alluded to earlier.⁶⁴⁵ The attorney's function is to represent clients. Courts sit to adjudicate disputes between individual clients, not those of larger classes of the public. When courts stray from client cases they stray into legislative territory, upsetting the balance of government and substituting their personal values for those of the electorate. The answer is to remove the courts from the resolution of issues more properly decided by legislators. The method is to restrict the judiciary and the bar to client cases, or, failing that, to discourage an expanded role by terminating government financing and tax exemptions for public interest law.⁶⁴⁶

1. *The Impact of Administrative Agencies*

As persuasive as this approach is in theory, it does not address significant aspects of the way American democratic government has developed,

644. For an illustration of this approach, see Address of Professor Ralph K. Winter, Yale Law School, to the American Enterprise Institute, *Organized Public Interest Litigation and the Judicial Model* (1980) (on file with author). Professor Winter has since been appointed to the U.S. Court of Appeals for the Second Circuit.

645. See *supra* p. 1457-58; see also *infra* p. 1547-48.

646. See Exec. Order No. 12404, 19 WEEKLY COMP. PRES. DOC. 224 (Feb. 10, 1983) (declaring organizations that "seek to influence the . . . determination of public policy through . . . litigation on behalf of parties other than themselves" ineligible to participate in Combined Federal Campaign). The order was challenged by several PILFs, including the NAACP Legal Defense Fund and the Sierra Club Legal Defense Fund, and invalidated by a panel of the District of Columbia Circuit. *NAACP Legal Defense & Educ. Fund v. Devine*, 727 F.2d 1247 (D.C. Cir. 1984). The opinion stressed the qualification of the PILFs as charities under § 501(c)(3) *id.* at 1258, and the charitable benefits of their litigation—the firms provide "direct health and welfare services to individuals or their families," within the meaning of the executive order, "by seeking judicial enforcement of the common law, statutory and constitutional rights of their clients, and by obtaining health and welfare benefits for the needy," *id.* at 1260. The dissent, however, found that the mandate to include advocacy groups "distorts the nature of charity." *Id.* at 1268 (Starr, J., dissenting). In a similar vein, the administration has also proposed to eliminate federal grants and contracts to advocacy organizations. See *OMB, Lobbyists at Loggerheads Over Advocacy Curb*, Wash. Post, Feb. 25, 1983, at A17, col. 2 (opponents "threatened to take their case against the proposal and its belligerent and beleaguered author, OMB general counsel Michael J. Horowitz, to the White House"). An effort to curb public interest litigation more directly is reflected in positions taken recently by the U.S. Government on the award of attorney's fees. Congress has enacted more than one hundred statutes authorizing attorney fee awards for a broad range of civil rights, consumer, environmental protection and other public interest litigation. See, e.g., 42 U.S.C. § 1988 (1982) (Civil Rights Attorney's Fee Awards Act of 1976); 5 U.S.C. § 504 (1982) (Equal Access to Justice Act). In recent litigation, the government has successfully contended that fee awards be restricted to "prevailing" parties, even under statutes which authorize a court to allow recovery whenever it determines that such an award is "appropriate." *Ruckelshaus v. Sierra Club*, 103 S. Ct. 3274 (1983). The government has also attempted to limit the size of the awards themselves to a basis of the costs involved, as opposed to the "market value" of the services rendered. *But see Copeland v. Marshall*, 641 F. 2d 880 (D.C. Cir. 1980) (rejecting government's proposal to limit awards to costs). After other circuits agreed with the District of Columbia opinion and rejected the proposed limitation, see, e.g., *Palmigiano v. Garrahy*, 616 F. 2d 598 (1st. Cir. 1980); *Oldham v. Ehrlich*, 617 F. 2d 163 (8th Cir. 1980), the administration has prepared legislation to scale fee awards to the salaries of government lawyers involved in the action. For a critique of this proposal, see Yost, *Don't Further Weaken Citizen Lawsuits*, N.Y. Times Nov. 12, 1983, at 23 (editorial).

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including the rise of governmental agencies. The administration of public policy in health, safety, natural resource development, communications, transportation, energy development, consumer and employee protection, labor relations, and environmental protection, for only a few examples, has evolved into separate, highly complex government programs. The legislation affecting these programs runs to volumes of the U.S. Code, providing legislative objectives and standards, leaving discretion for implementation by agencies in areas too technical (or too politically hazardous) for the Congress to resolve. Within these mandates, some broad, some narrow, government agencies have become major decisionmakers on almost every conceivable social issue, including those of most direct concern to American corporations.⁶⁴⁷

The merits of expanded agency power in American government are well beyond the scope of this study.⁶⁴⁸ The fact of their power, however, is too pertinent to ignore. Institutional checks on this power are provided by the legislature and the courts. A proposal which would rely on the legislature alone to provide the necessary checks ignores the fact that there is, at the national level, but one legislature with but limited time (and often no more particular knowledge of the details of an agency program than a conscientious court could muster) to attend to, among all of its other priorities, the programs of several dozen federal agencies, each with thousands of employees, each program raising a host of issues including, at bottom, whether these employees are adhering to legislative policies and standards. The Congress can, and does, attempt to arrange its priorities to oversee its most volatile laws.⁶⁴⁹ It can also, through appropriations, withhold funds for programs which have proven unpopular to a significantly

647. The agency decisionmakers, like the courts, are elected by no one. The terms of office of independent federal agency commissioners and almost all agency staff extend beyond any single administration; departmental secretaries and other agency heads are usually appointed with only routine approval by one house of Congress. To characterize review of these decisions as an unconstitutional intrusion on *legislative* authority requires therefore some extension of the concept of the legislature.

648. It is interesting to note, however, that in the New Deal administration of President Franklin Roosevelt, agencies were welcomed as a counterforce to corporate influence on social policy decisions, created to protect the public interests. See COUNCIL FOR PUBLIC INTEREST LAW, *supra* note 95, at 26-29. By the late 1960's, the prevailing perception was that the agencies had become captured by private interests, giving momentum to judicial action and to public interest litigation. By the late 1970's, business interests perceived the agencies as captured by liberal, anti-business elements, a major factor in their resort to litigation and to the creation of the business-sponsored PILFs.

649. The Endangered Species Act, 16 U.S.C. § 1536 (1982), for example, which strikes a controversial balance between protection and development interests, has been reviewed and amended or reauthorized by the Congress five times in the past ten years. See generally M. BEAN, *THE EVOLUTION OF NATIONAL WILDLIFE LAW* 329-41 (1983) (explaining original development of Endangered Species Act). Congress, at the time of this writing, was struggling through similar conflicts over the Clean Air Act, 42 U.S.C. § 7401-7642 (1982). Another mechanism for Congressional supervision of agency action was the "one-house veto," allowing rejection of an agency proposal by less than a full, bicameral vote. See, e.g., Immigration and Naturalization Act, § 244(c)(2) 8 U.S.C. § 1254(c)(2) (1982). In 1983, the Supreme Court found this mechanism unconstitutional, *INS v. Chadha*, 103 S. Ct. 2764 (1983), sending congressmen and scholars in search of another means to the same end.

vocal constituency.⁶⁵⁰ No one can seriously contend, however, that this level of oversight is adequate to ensure agency compliance with the law. There is simply too much agency action and too little Congress. The other safeguard, for better or for worse, involves the courts. The great bulk of public interest litigation—left, right, and center—involves the actions of governmental agencies.

Recognizing that the courts will necessarily have *some* role in the resolution of social issues which have been delegated to government agencies, the critics of public interest law would seek to restrict courts and public interest attorneys to cases involving concerns of “live clients.”⁶⁵¹ The distinction blurs from the start. Litigation on behalf of the poor, political minorities and social minorities, has long been recognized as charitable.⁶⁵² As has been seen, while much of the work of the leading organizations in these fields has responded to the plight of individual “clients,” a significant effort has involved the identification of problem programs and impact litigation to change the ways in which they are being implemented. If the contention is that such litigation for a monetary remedy is proper, but for such a remedy as changing an agency practice is not, it seems an unnecessarily restrictive one and one which flies in the face of a line of precedent viewing litigation for the reform of certain programs as a constitutional right.⁶⁵³ Nor can a logical distinction be made among those individuals whose civil rights have been injured, those whose rights to resist summary eviction are ignored, and those whose asserted rights involve a safe workplace, a public hearing before being relocated by a government construction project, or simply breathing lead-free air. All of these injuries raise questions of social policy. All come before courts in public interest litigation.

Perhaps the proffered “live client” test simply requires the presence of a warm body. But even now, all litigation requires the identification of an

650. The legislation-by-appropriations approach to the resolution of issues has been widely and justifiably criticized as government action which has been given little consideration in the Congress, the courts, or any other forum. By its very secretiveness it is the approach most susceptible to abuse by narrow-interest groups. It is, nonetheless, increasingly used. A vocal minority can be placated without surfacing an issue for general debate, and without congressional accountability.

651. See Winter, *supra* note 643.

652. “[T]he undisputed evidence in this record reveals that as a result of the NAACP LDF’s litigation effort, primarily on behalf of low income blacks, ‘hundreds of thousands of persons have received direct benefits, such as income supplementation in the form of back pay and future earnings, better educations, improved health care, better housing and other living conditions, humane conditions of incarceration and, in the case of our capital punishment program, life itself.’” NAACP Legal Defense & Educ. Fund v. Devine, 727 F.2d 1247, 1260 (D.C. Cir. 1984) (quoting affidavit of J. Greenberg, Director-Counsel, NAACP LDF). Neither LDF nor the ACLU has required poverty as a condition of undertaking representation. Rather, they have looked to the underlying issue. Poverty, then, would not be a criterion which characterized the clients of even the most widely accepted public interest practice.

653. See NAACP v. Button, 371 U.S.C. 415 (1963). Indeed, such an approach boils down to an injury permit system: The illegality is condoned subject to the payment of damages, however inadequate the damages may be for victims of discrimination, air pollution, or any other unlawful practice.

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injured individual for purposes of standing.⁶⁵⁴ The proposition may then boil down to the somewhat obscure principles of barratry—who contacts whom first. When the National Highway Transportation Safety Administration proposes weakening automobile bumper standards, for example, or the Environmental Protection Agency considers doubling the accepted particulate emission levels in urban areas, must a PILF wait until someone walks in the door? May it, upon notice, alert people who it knows are interested in the problem? This may be the rub for some, but this objection, too, has been dismissed by the Supreme Court.⁶⁵⁵

At bottom, a “live client” requirement for public interest law represents little more than an attempt to de-lawyer one side of some of the major legal action in America. In the meantime, on all of these issues raised by government agency actions, the private bar does not sleep. Its contacts with government agencies on behalf of corporate America far exceed those of public interest organizations.⁶⁵⁶ It follows the Federal Register daily for notice of surprises not of its own making, and it will use the judicial system no less vigorously to set broad precedent and secure administrative practices favorable to its commercial clients. The “live client” requirement ratifies a *status quo* in which moneyed interests may raise broad issues at will, while restraining access by others. Stated this baldly, the proposition is not likely to carry the day.

In sum, it is quite late in the development of American society to try to close the door on public interest law.⁶⁵⁷ The nature of our government requires the practice, as does a large and increasing body of federal laws predicated upon citizen lawsuits for their very effectiveness.⁶⁵⁸ It would doubtless be more pleasant to return to a less complicated and less litigious world. One sees few people predicting it. Once the validity of representing any class of underrepresented citizens is acknowledged—a point it is assumed everyone has by now passed—attempts to limit the class become as selective and result-oriented as attempts to define the public interest.⁶⁵⁹ This is not to assert that all litigation should be accepted as in the

654. See, e.g., *Sierra Club v. Morton*, 405 U.S. 727 (1972).

655. *In re Primus*, 436 U.S. 412 (1978) (ACLU may inform potential plaintiff that free legal assistance is available).

656. See *infra* p. 1552.

657. For recent attempts to close at least some side doors on public interest advocacy, however, see *supra* note 645.

658. For a listing of statutes providing attorney’s fees, see *Alyeska Pipeline Co. v. Wilderness Soc’y*, 421 U.S. 240, 260 n.33 (1975).

659. Proponents of “live client” restriction are most aggressive in their criticism of the “liberal” PILFs. See *Winter, supra* note 643. One example of the problem of selectivity in the application of these principles is the recent attempt to disqualify Planned Parenthood from the Combined Federal Campaign as an ineligible charity, an attempt which, following a temporary restraining order, has apparently been abandoned. See *Gifts Ok’d to Planned Parenthood*, *New Orleans Times Picayune/States Item*, Sept. 16, 1983, at § 1-6. One would hope the crowning example arose in *NAACP Legal Defense Fund v. Devine*, 727 F.2d 1247 (D.C. Cir. 1984), in which the plaintiff PILFs were barred from a federal campaign list which included both the Moral Majority and the U.S. Olympic Commit-

public interest. It is to say that the guidelines developed by the IRS after an excruciating review of the question—hinged on access and on the inability of financial interests to raise the issue—appear to be the most internally consistent, and the most fair.

2. *The Impact of Money*

*The role that money is currently playing in American politics is different both in scope and in nature from anything that has gone before. The acquisition of campaign funds has become an obsession on the part of nearly every candidate for federal office. The obsession leads the candidates to solicit and accept money from those most able to provide it, and adjust their behavior in office to the need for money—and the fear that a challenger might be able to obtain more.*⁶⁶⁰

There is another emerging difficulty with “plaguing both houses” of public interest law on the grounds that its practice will stimulate, in theory at least, an undemocratic transfer of power to the judiciary. We have never seen a time when the power of financial interests, predominantly that of large corporations (but also that of large labor unions), so thoroughly influenced the other two branches of government.⁶⁶¹ The courts have become the only branch which, if not for sale, does not openly seek major corporate contributions and reciprocate by, at a minimum, providing special access to decisionmaking.

Following the proliferation of government agencies in the New Deal, the problem of undue influence was perceived as one of ensuring a distance between a new, expanded executive and corporate America, between the regulator and the regulated.⁶⁶² Ten years ago, political contributions were still the gambit of a few wealthy donors, and of a limited number of labor and business trade organizations.⁶⁶³ Contributions were becoming

tee, on grounds that the PILFs they were “controversial,” *id.* at 1261–64, and did not provide services to the “truly needy,” *id.* at 1259–60.

660. Drew, *Politics and Money* (pt. 1), *NEW YORKER*, Dec. 6, 1982, at 54. Ms. Drew, the political reporter for the *New Yorker*, continued the article in the December 13, 1982, issue.

661. *Id.*

662. The problem did not arise from the outright purchase of agency decisions—there was at least no marketplace for the purchases to occur—but rather from an unseemly coziness between the two as business executives and their lawyers rotated through the agencies on their way to the top. The problem was met with conflicts of interest statutes; *see, e.g.*, Ethics in Government Act of 1978, 28 U.S.C. § 591–98 (1982). These statutes have been criticized both as being too lax and too strict—leaving the impression they have probably struck the right balance.

663. Prior to the 1970's, a few labor unions and trade and professional associations had established political action funds. The AFL-CIO's Committee on Political Education (“COPE”) was an early leader; the Business-Industry Political Action Committee (“BIPAC”) was an early business response. These groups were sanctioned under an administrative interpretation of the law permitting labor and business organizations to administer voluntary donations from members and employees for political campaigns. Uncertainty over the future of this interpretation was a motive behind legislation

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critical to successful campaigns, however, as television began to capture the political market. Television was undeniably effective. It was also astronomically costly, as were its associated market-research and polling operations. In 1974, Congress responded to these pressures by establishing a mechanism for public funding of presidential campaigns; other federal campaigns were made subject to limits on contributions by individuals, campaign committees and the candidates themselves.⁶⁶⁴ In 1976, the Supreme Court declared the core of these limitations unconstitutional.⁶⁶⁵ The effect was to lift the ceiling from private campaign financing.⁶⁶⁶

The results were dramatic. In 1974, the average cost of campaigning for a seat in the House of Representatives was \$50,000.⁶⁶⁷ By 1982, races costing \$500,000 were common.⁶⁶⁸ Congressional candidates spent an estimated \$300 million on the 1982 elections, up more than twenty-five percent from 1980.⁶⁶⁹ The ten Republican Senators re-elected in 1982 spent an *average* of almost \$1.7 million to hold their seats, over five times more than their expenditures in 1976.⁶⁷⁰ The eighteen Democrats re-elected to the Senate spent \$1.4 million each.⁶⁷¹ An assistant to the President of the United States made the following comment on these elections:

I've got to think that the money and all the other resources combined will be worth about two percentage points for about thirty candidates. I think the story of this off election is that we've marshalled

in 1972 permitting the creation of PACs with voluntary contributions. Drew, *supra* note 660, at 59-60.

664. Congressional investigations into campaign financing revealed, inter alia, that the Committee to Re-elect the President had received almost \$17 million from only 124 contributors, and over \$1.7 million from individuals who were subsequently appointed as United States ambassadors. Drew, *supra* note 660, at 54, 59. The congressional response was the Federal Election Campaign Act Amendments of 1974, Pub. L. 93-443, 18 U.S.C. §§ 614-17 (repealed by Pub. L. 94-283, 90 Stat. 946).

665. *Buckley v. Valeo*, 424 U.S. 1 (1976). The provisions struck down included those placing ceilings on total campaign spending, personal expenditures by candidates, expenditures by a candidate's campaign committee, and those by independent groups and committees on behalf of candidates.

666. The Court may be about to lift the lid yet higher if not remove it altogether. It has accepted two appeals challenging the remaining limitations on PAC spending. *Federal Election Comm. v. National Conservative Political Action Comm.*, 627 F.2d 953 (D.C. Cir. 1980), *prob. juris. noted*, 52 U.S.L.W. 3756 (Apr. 16, 1984), and *Democratic Party v. National Conservative Political Action Comm.*, 578 F. Supp. 797 (E.D. Pa. 1983), *prob. juris. noted*, 52 U.S.L.W. 3756 (Apr. 16, 1984).

667. *Running with the PACs*, *TIME*, Oct. 25, 1983, at 21-22.

668. *Id.*

669. *Slinging Mud and Money*, *TIME*, Nov. 15, 1982, at 43.

670. *Id.*

671. *Id.* The sums are no less impressive for gubernatorial and presidential races. In 1983, the winning candidate for Governor of the State of Louisiana reported campaign contributions exceeding \$14 million. See "Edwards Had Healthy Help Filling War Chest," *New Orleans Times Picayune/States Item*, Nov. 25, 1983, at § 1-19. As of March 1984, the reelection committee for President Reagan had raised nearly \$9 million and spent \$6 million for a nomination which would be untested. *Reagan's Committee Is Spending Millions*, *New Orleans Times Picayune/States Item*, Apr. 22, 1984, at 4, col. 1.

our resources and bought one or two Senate seats and fifteen to twenty House seats, and that's really good.⁶⁷²

The primary source of these monies was political action committees ("PACs"), the great majority representing American business interests. PAC funding for the 1982 elections reached \$85 million.⁶⁷³ Another estimated \$160 million went to local races and related advertising and administration.⁶⁷⁴ There were 113 political action committees in 1972; there were 3,149 by July 1982.⁶⁷⁵ However dissimilar their points of view, these groups have two features in common. They give money to political candidates; they expect to get something in return.

They apparently get it. At the minimum, they are buying special access to decisionmaking. In the words of Justin Dart of Dart Industries (which has supported one of the largest business PACs), dialogue with politicians "is a fine thing, but with a little money they hear you better."⁶⁷⁶ Others are more candid. In the words of a Congressman on the receiving end: "You can't buy a Congressman for \$5,000. But you can buy his vote. It's done on a regular basis."⁶⁷⁷

672. Drew, *supra* note 660, at 68 (quoting Lee Atwater, deputy assistant to President Reagan in 1982).

673. *Running with the PACs, supra* note 667, at 20. PAC funding is projected at over \$100 million in 1984. *PAC Donations Reaching a Record*, New Orleans Times Picayune/States Item, Oct. 8, 1983, at 5, col. 1. The National Association of Home Builders, for example, is creating a \$4.7 million fund or "Build-PAC" in order "to elect a pro-housing, pro-business Senate and House." *Id.*

674. *Running with the PACs, supra* note 660, at 20.

675. *Id.* By numbers, business PACs lead with 1497 committees; trade associations (such as the National Association of Realtors) accounted for 658 PACs; labor unions followed with 350 PACs. There are also over 600 single interest groups ranging from the Ukrainian American PAC to the Ocala (Florida) Firefighters. *Id.* at 21. By contributions, corporate PACs and trade associations accounted for \$54 million; labor for \$20 million; the remaining interest groups \$6 million. *Id.*

676. Drew, *supra* note 660, at 130. See also *Running With the PACs, supra* note 667, at 21 ("There is no reason they [PACs] give money except in the expectation of votes.") (remarks of former U.S. Representative William Brodhead of Michigan). The Grumman PAC Chairman is quoted as saying: "We don't expect contracts because we gave someone \$5000. But the likelihood of us getting in to see the Congressman is much higher." *Id.* at 24. The business community is itself of two minds in describing what it is buying through political contributions. While a BIPAC representative is quoted as claiming that BIPAC has "changed the faces of a lot of members of Congress," the same representative also adds, without apparent irony, that "we of the business community are very upset about the charge that members of Congress sell their votes. We of the business community have a very high regard for members of Congress. We're appalled by that sort of talk." Drew, *supra* note 660, at 72. One enterprising congressman has established a Speakers Club for which the membership cost is \$5000 a year per individual, \$15,000 a year per PAC; when asked what members received in return, he is reported as stating: "Access. Access. That's the name of the game . . . we sell the opportunity to be heard." *Id.* at 94-95.

677. *Running with the PACs, supra* note 667, at 20 (quoting Rep. Thomas Downey of New York). The record of special-interest legislation in recent years gives credence to these claims. Votes have been taken on such wide-ranging subjects—each with its own economic interests and PACs—as dairy price supports, REPORT OF THE CHAIRMAN OF THE BOARD, COMMON CAUSE, Aug., 1982, at 11; used car dealers regulation, *id.*; mortgage interest rates, *id.*; clear air standards, *id.*; independent oil producers, *Politics and Money*, Drew, *supra* note 660, at 80-81; regulation of dentists and doctors, *id.* at 133; all savers certificates, *id.* at 87; and the application of antitrust laws to brewers, *id.* at 138. The influence of special-interest PACs is not restricted to the U.S. Congress. The Mayor of Fresno,

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The scope of influence—and approaches to limit it—are more properly studied elsewhere.⁶⁷⁸ It is again the fact of this influence which is relevant to proposals to limit public interest law. The wielders of this influence are predominantly American corporations and their trade associations, the same interests which happen to be financing, directing and benefitting from the business PILFs.⁶⁷⁹ The effect of this influence is to remove non-moneyed interests further from the political process.⁶⁸⁰ As Senator Robert Dole has pointed out: “[T]here aren’t any Poor PACs or Food Stamp PACs or Nutrition PACs or Medicare PACs”⁶⁸¹; if there were, “you might get a different result.”⁶⁸²

In short, this is hardly a time to look with confidence to the non-judicial branches of government to resolve the particularized challenges which the traditional PILFs, representing noncorporate interests, are bringing before the courts. The question is whether financial interests, having captured a disproportionate share of the other two branches of government, should now go unopposed in the third. As the Supreme Court observed even before the rise of money in politics, “under the conditions of modern government, litigation may well be the sole practicable alternative open” to adjust these grievances.⁶⁸³

California, has recently asserted that, “In California, the relationship between campaign contributors and legislation is frightening and blatant When we [local officials] go to see legislators, it’s difficult to compete with all the moneyed interests.” *Panel: Cities Losing Influence*, New Orleans Times Picayune/States Item, Nov. 29, 1983, at 4 col. 2. The Fresno mayor is also reported to have said that California legislators often admit publicly that their voting records are influenced by corporate donors to their political campaigns. *Id.* Yet money does not always prevail. See Epstein, *Special-Interest Bills Are Given Senate Beating*,” New Orleans Times-Picayune/The States-Item, Dec. 19, 1982, at 9 col. 3. The article begins: “The doctors were lacerated, the beer distributors punctured, the shipping industry scuttled, the timber companies warped, and the National Football League sacked.” *Id.*

678. Fuller explanation of these topics can be found in Drew, *supra* note 660. Among other conclusions in these sources is the recognition that, because PAC money and influence tends to support incumbents, there is little optimism that incumbent politicians will be motivated to vote for significant changes.

679. For example, one of the vice presidents of BIPAC, an influential business political action committee, is J. Robert Fluor of the Fluor Corporation, who is chairman of the Capital Legal Foundation, and a Director of NLCPI. Corporate interests have not only dominated the PAC arena but also the more traditional lobbying activity in Washington, D.C. A three-year old organization entitled the “Free the Eagle National Citizens Lobby” dedicated to “free market, free enterprise” legislation led all Washington lobby groups in expenditures during 1983. *New Conservative Group Was Top-spending Lobby*,” New Orleans Times Picayune/States-Item, Nov. 27, 1983, at 4 col. 3.

680. One member of Congress has concluded: “We have a breakdown of constitutional democracy, which is supposed to be based on citizen and constituency access.” *Government of, by and for the PACs*, COMMON CAUSE, Aug. 1982, at 16, 18 (quoting Congressman Jim Leach of Iowa). The breakdown according to Leach, occurs to some extent because PAC money from out-of-state controls the election, and affects the subsequent decisions, of state-wide candidates. *Id.*

681. Drew, *supra* note 660, at 147.

682. *At the mercy of the Highest Bidder*, Common Cause, Aug. 19, 1982, at 9.

683. NAACP v. Button, 371 U.S. 415, 429 (1963). The statement in full reads:

Groups which find themselves unable to achieve their objectives through the ballot frequently turn to the courts. Just as it was true of the opponents of New Deal legislation during the 1930’s, for example, no less is it true of the Negro minority today. And under the conditions of modern government, litigation may well be the sole practicable avenue open to a minority to

V. CONCLUSION

*Pacific Legal Foundation is a public interest law firm in the same way catsup is a vegetable under Reagan's new school lunch guidelines.*⁶⁸⁴

The purpose of this study has been to examine the activities of business-sponsored public interest law firms against a background of long-accepted concepts of charity and more recently developed concepts for the practice of public interest law. It has not sought to derogate the contributions of business to American life. It has not denied the right of the American business community to advance its interests individually or collectively, directly or through tax-exempt organizations, in courts of law. It does suggest, however, that to qualify firms as public charities that are funded and directed by business interests and that act substantially on their behalf stretches the concepts of charity and public interest practice beyond meaningful definition. And beyond the present standards for public interest law.

The suggestion is not over-broad. It does not disqualify these firms from eligibility under favorable tax-exempt categories other than section 501(c)(3). It does not speak to the desirability of tax deductions for litigation by corporate enterprises as necessary business expenses. Nor does it question firms established by business interests which are intended to address, and which do address in fact, dockets of issues unrelated to those which affect the supporting corporations. Indeed, the suggestion here is so narrow in scope as to raise the question: Why bother?

The answer, in this author's view, is one of credibility. It would be a bit starry-eyed to consider the tax laws of the United States as ones carrying a high degree of public confidence. One area in which the American public obviously retains its confidence however, if voluntary contributions are any measure, is the field of charity, an area almost uniquely defined by our tax laws.⁶⁸⁵ In 1984, George Orwell's famous description of a totalitarian society, one of the chief devices used to corrupt social values was the corruption of language. Peace became a state of continuous war. Truth-speak became lies. The corruption in this case is on less grand a scale but it affects one of the redeeming values, public charity, of a naturally self-interested world. If the public interest has a meaning, it is as a

petition for redress of grievances.

Id. at 429-30 (footnotes omitted).

684. Gerber, *The Pacific Legal Foundation: Its Goal is Deregulation*, CAL. LAW., Nov. 1981, at 28 (quoting Robert L. Gnaizda, senior attorney, Public Advocates, Inc. of San Francisco, Cal).

685. Numerous states require registration for the operations of charities, and impose varying levels of financial and reporting requirements. These states usually accept, however, federal recognition of charitable status which is, of course, provided under the federal Internal Revenue Code.

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value which transcends the places where private interests go. This is a meaning worth preserving.

APPENDIX I
SUMMARY OF DOCKETS AND EVALUATIONS

Firm	Valid	Questionable	Invalid	Total Evaluated	Amicus Appearances	Nat. Res. Energy & Envir.	Unevaluated Due To Insufficient Information
Pacific Legal Foundation	46	16	70	132	72	95	35
Mountain States Foundation	17	10	41	68	21	37	5
Mid America Legal Foundation	1	10	13	24	19	10	—
Gulf and Great Plains Foundation	13	4	13	30	16	10	4
Mid Atlantic Legal Foundation	5	5	10	20	12	12	—
Southeast Legal Foundation	8	4	5	17	11	6	—
New England Legal Foundation	7	6	20	33	27	20	11
Capital Legal Foundation	<u>5</u>	<u>3</u>	<u>7</u>	<u>15</u>	<u>4</u>	<u>6</u>	<u>—</u>
Totals	102	58	179	339	182	196	55

Total Cases: 394

Total Cases Evaluated: 339

Appendix II

Analysis of the the Business PILFs Under the IRS Guidelines: An Economic Philosophy Meets the Economic Feasibility Test

The question of this study is whether the organizations described are engaged in the practice of public interest law. In addressing this question, it was necessary to consider the perspective of the business PILFs on the public-interest nature of their litigation, to develop a method for researching their activities, and to develop another for evaluating their cases (or those of any other PILF) under the policies of the Internal Revenue Service.

I. RATIONALE FOR THE BUSINESS PILFs: DAVID AGAINST GOLIATH

The anti-business public interest law firms continually bombard the public with the rhetoric that they are in an unequal battle with the robber barons of "Big Business." They portray themselves as fighting for the poor against tremendous odds, for obviously their "Big Business" opponent has the money and power. They are particularly fond of posturing themselves as David aligned against Goliath. The evaluation of the disparity in force is correct, only the actors are mislabeled. The anti-business "public interest" law firms are Goliath. "Business" is the David, but without his trusty sling shot.

Presentation to the National Association of
Manufacturers by Raymond M. Momboisse, Managing
Attorney, Pacific Legal Foundation, 1981.¹

The business PILFs respond, on one level, to the broadening role of the judiciary in American life. The earlier views of Lewis Powell were reflected more recently by William French Smith, soon after his appointment as Attorney General, in a campaign against "judicial activism" in such areas as abortion rights, desegregation, antitrust, employment discrimination, and environmental protection.² As noted earlier, Attorney General Smith had nonetheless been instrumen-

1. R. Momboisse, *Anti-Business Public Interest Law Firms vs. Private Enterprise—The Unequal Struggle* (speech to the National Association of Manufacturers Public Affairs Conference, Boca Raton, Fla., Jan. 16, 1981).

2. Speech of the Attorney General, (Oct. 29, 1981) *reported in* New Orleans Times-Picayune/States-Item, Oct. 30, 1982, at 1-3. The Attorney General added that the Justice Department would be working to identify those key areas in which the courts might be convinced to desist from actual policy-making so that "errors of the past might be corrected." The courts have assumed "greater power of review over governmental action" in reaching decisions in these areas which they could avoid altogether under judicial doctrines of "standing, ripeness, mootness and presence of a political question." Conspicuously absent from the Attorney General's list of problem areas, were use of the judiciary to *limit* the employment of minorities, for example, or environmental protection, giving rise to the

tal in the creation of the Pacific Legal Foundation, the most litigious of the business PILFs.³ Indeed, the business PILFs met the judicial dragon with a different sword. Since the courts were involved, and were coming up with the wrong answers, the need was not to remove courts from social questions but rather to use them to change the answers. The business PILFs continue to decry judicial activism,⁴ characterized in their literature by their arch-nemesis, Ralph Nader. In practice, however, they have enjoyed the frequent characterization as "Ralph Naders of the Right."⁵

On another level, the business PILFs respond to the expanding role of government in American life, and it is on this ground that they stake their broadest philosophical claim. An army of government agencies, spawned in the 1930's and re-activated in the 1970's, was stifling American enterprise and freedoms. The mission of the business PILFs is to remove an over-reaching government from the nation's business.⁶ This rationale would support several of the more widely-publicized actions of the business PILFs, including those to lift grazing restrictions on public lands,⁷ and to require administrative search warrants for OSHA violations.⁸ Where government involvement will *benefit* industries with which

suspicion that the problem might not be so much with the concept of using the courts as it is with what certain plaintiffs have been asking the courts to do.

3. See *supra* TAN 186.

4. See *The Power of Our Judges: Are They Going Too Far?* U.S. NEWS & WORLD REP., Jan. 19, 1976, at 29; Summary of Events in the Southeast Legal Foundation, June 1976 ("There is a growing awareness of the increasingly active role of the Courts in our Nation's affairs.") Consider also the statements of Michael Horowitz, one of the foremost proponents of the business PILFs and currently legal advisor to the Office of Management and Budget, reported in a recent interview with *The National Law Journal*:

Mr. Horowitz has also involved himself in specific policy areas, including development of block-grant proposals, civil rights and, most publicly, the role of attorneys inside and outside of government. "If there is a fundamental override to what I look to do," he said, noting his involvement in the debates over the Legal Services Corp. and attorney fees, "it is to get lawyers out of the policy game." The expansion of legal "rights", he said, has masked an "undemocratic" transfer of power to lawyers. Public interest lawyers, he added, "are not representing clients, they're representing an ideology—and it happens to be the ideology of lawyers."

Nat'l L.J., Aug. 2, 1982, at 21.

5. See *A Business Brand of Public Interest Law*, *supra* note 455 (statements of Legal Director, Pacific Legal Foundation); in addition, consider the discussion reported by Flaherty:

There is no more basic disagreement among the conservatives, however, than that of the whole movement toward conservative public interest law. These conservative lawyers face a conundrum: Although they generally disapprove of judicial activism, they—like their liberal counterparts—are themselves working the courts for political ends. . . . There is, Mr. Popeo [of the Washington Legal Foundation] admitted, something of a feeling of "throwing stones and being in a glass house" in the pursuit of conservative public interest law. But, like Mr. Zumburn, he takes a realistic position. "It's a fact of life," he said. "Judges are into every aspect of American life. We need a check on the radical left wing."

Flaherty, *Right Wing Firms Pick Up Steam*, Nat'l L.J., May 23, 1983, at 1, 27.

6. *Id.*

7. *Valdez v. Applegate*, 616 F.2d 570 (10th Cir. 1980).

8. *Marshall v. Barlow's, Inc.*, 436 U.S. 307 (1978). This same rationale is, of course, also available to the great majority of those traditional PILFs which have defended the rights of the poor, racial minorities, or political extremists, against what they perceived to be an overreaching government, as well as to those newer firms which have arisen and exist largely to litigate against governmental highway, water resources, agriculture, and construction development programs. See, e.g., *Sierra Club v. Lynn*, 502 F.2d 43 (5th Cir. 1974); *Sierra Club v. Froehle* (Kickapoo River), 486 F.2d 946 (7th

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they are concerned, however, these firms have not been reluctant to litigate in support of it. While the anti-big-government rationale is certainly present, therefore, it is not necessarily one which uniquely describes the business PILFs programs. Neither is it one which distinguishes the business PILF positions from those of their corporate clients in anti-big-government litigation.

The rationale for the business PILFs most frequently offered in their literature and most consistent with their activities is their role in defense of American business itself.⁹ If the earlier PILFs had a common denominator, in this view, it was in their role as the “principle legal adversary” to corporate America.¹⁰ They sought to wrest “business control” from the owners and professional managers and invest it in “socially conscious non-investors who will stress social ends rather than efficiency and profits.”¹¹ Their litigation raised the price of American products, diverted investment capital to non-productive areas, and increased the cost of development;¹² it “stopped development of housing, dams, energy and production facilities.”¹³ The business PILFs seek to offset these injuries. In so doing, they are not merely imitating the efforts of their corporate allies. They are providing a service to a public which the affected corporations cannot provide themselves.¹⁴

Cir. 1973); *Sierra Club v. Ruckelshaus*, 344 F. Supp. 253 (D.D.C. 1972), *aff'd per curiam*, 4 Env't Rep. Cas. (BNA) 1815 (D.C. Cir.), *aff'd sub nom. Fri v. Sierra Club*, 412 U.S. 541 (1973); *Sierra Club v. Hardin*, 325 F.Supp. 99 (D. Alaska 1971), *remanded sub nom. Sierra Club v. Butz*, 3 ENVTL. L. REP. (ENVTL. L. INST.) ¶ 20,292 (9th Cir. 1973). The silence of the business PILFs in these latter, “anti-government” areas of litigation—except as intervenors and amici on behalf of the government-sponsored development—again raises the suggestion that their opposition to “big government” is a selective one, and depends largely upon whether they approve of what the government is doing: whose ox is getting fed.

9. Consider the remarks of John B. Connally, former United States Secretary of the Treasury and Governor of Texas, tracing the history of the business PILFs: “[A]nd businessmen became afraid to stand up for what they believe. And this is a serious question in our country. I say this is a deplorable state in a free society. But, that really is the genesis of why you have the kind of public interest law I've been talking about.” Remarks at the Second Annual J. Simon Fluor Memorial Award Honoring the Associated General Contractors of America, Dec. 8, 1977 (brochure on file with author).

10. See M. Horowitz, *The Public Interest Law Movement: An Analysis with Special Reference to the Role and Practices of Conservative Public Interest Law Firms 11* (unpublished report 1980) (cited with the permission of the author). “Cloaked in a justification of providing greater access to the judicial system, these earlier firms were in fact movements of the left to socialize America.” *Id.* at 12-14.

11. Momboisse, *supra* note 401, at 11.

12. *Id.*

13. *Id.*

14. See, e.g., P. Rubin & E. Jordan, *Business Oriented Legal Foundations: Who Needs Them? An Economic Justification* (unpublished manuscript 1981) (on file with author). The authors postulate that business PILFs can provide a counter-force to government regulatory attempts that might prevail over weaker opposition and lead to economic inefficiencies. They offer three case studies in support: *Marshall v. Barlow's, Inc.*, 436 U.S. 307 (1978), involving the need for an administrative search warrant for OSHA inspections; *Chrysler Corp. v. Brown*, 441 U.S. 281 (1979), involving disclosure of corporate employment records relating to affirmative action; and *Monsanto Co. v. Kennedy*, 613 F.2d 947 (D.C. Cir. 1979), involving the ban of potential carcinogens in plastic beverage containers. The authors conclude that the participation by business PILFs as amici curae in these proceedings, raising issues relating to the impact of these proposals on the business community, led to the defeat or modification of these proposals with resulting economic benefits to the entire business community. In their contentions the authors make significant assumptions about the impact of amicus briefs which are not shared by this writer. More to the point, however, they make no claim that the business parties in the case were unable to present—or indeed did not present—these same issues.

This rationale—the provision of representation *beyond* that available to corporate America—goes to the heart of the business PILFs' eligibility for exemption under § 501(c)(3) and for this reason bears closer examination.

According to one business PILF leader, corporations are at a major disadvantage in litigation against environmental, consumer or civil rights-oriented firms, whose “uninvestigated” lawsuits are cheap to file and costly to defend.¹⁵ Businesses are at a similar disadvantage in dealing with government agencies.¹⁶ They cannot afford to monitor regulatory programs as opposing groups can. They cannot develop expertise in toxics, labor, or the myriad laws which can be used against them. They are victims of “sweetheart” suits between colluding environmental groups, for example, and sympathetic government agencies which can result in quick, adverse decisions.

Moreover, corporations suffer tactical handicaps which limit their effectiveness to represent the greater public interest. One is their bottom line, which is not to vindicate legal principle but to maximize profits.¹⁷ Faced with protracted litigation or confrontation with an agency, their first instinct will be to compromise the issue and win what they can. The other handicap is a corollary; everyone *knows* that their profits are the bottom line. Everyone knows that it is not the public interest. Businesses are simply not credible standard bearers for the larger social issues inherent in their cases. They are at a major psychological disadvantage.

Pausing to reflect on these justifications, each tells but a part of a larger story. It would be hard not to accept that much of public interest law—particularly that on behalf of consumers, worker's safety and environmental protection—has been directed at industry. (It has also been directed at government programs such as welfare rights and prison reform which have little to do with industry.) The fact that identified consumer interests inhere in the labeling of dangerous drugs or the reduction of pollution, however, does not automatically mean that a countervailing public interest, beyond that of the affected industries, lies in reduced labeling and increased pollution. Public concerns for consumer protection and clean air arose because corporate bodies were uninterested in achieving them. Charity, as it has come to be known, does not support what private business can and arguably should do.

Turning to the rationales just offered, the question is the extent to which corporations are genuinely at a disadvantage in this type of litigation. That public

The Chrysler and Monsanto Corporations had no difficulty retaining counsel: Barlow's action was funded from the start by the American Conservative Union's “Stop OSHA” project, itself supported by industry.

15. In the view of one senior attorney:

All too often the public interest has little or no proof of its charge; indeed, it has not even bothered to investigate the facts prior to filing a complaint. Its rationale is that it can use discovery to find the facts it needs, or shift the burden to business to disprove its wild charges . . . [Business] costs are even greater when the charges it must refute are vague, emotional and inflammatory—as they always are.”

Momboisse, *supra* note 401, at 2.

16. *Id.* at 2.

17. This rationale and the one following is taken largely from *id.* at 3-7, and M. Horowitz, *supra* note 10 at 25-30.

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interest lawsuits are inexpensive for plaintiffs, and “uninvestigated” is, at best, undocumented, and one which ignores the some fundamentals of PILF life. Public interest firms survive—absent a steady flow from corporate donors—on credibility with foundations, members, the press, and the public. Few acts lose credibility more quickly than a groundless charge. The reckless, desperate lawsuit is far more likely to come from an *ad hoc* group formed to oppose a particular industrial proposal—or from a competing industry—than it is from a public interest firm. Nothing, furthermore, would scuttle a PILF budget more quickly than the supposition that lawsuits are cheap. Any claim involving contested facts will cost thousands of dollars at the trial level alone. For participating business parties, every dollar is a write-off as a necessary business expense.¹⁸ For a PILF, every dollar must be raised. Less than thirty percent of the time of public interest lawyers is spent on matters relating to administrative hearings and litigation, and only a small fraction of that in litigation against specific businesses.¹⁹ In two of the most active areas of public interest litigation, for example—consumer and environmental protection—it would be hard to find any significant number of PILF cases filed against corporate defendants;²⁰ complaints are normally filed instead against government programs, or government regulation of a line of industry.²¹ However examined, the spectre of cheap and wilful lawsuits simply does not conform to the reality of public interest law.

It seems no more persuasive that businesses are at a disadvantage in dealing with government agencies. The two major industries in Washington, D.C., are the government and the private bar, and the major industry of the private bar is to monitor the activities of government. The law firms of Washington do not monitor these activities for Mexican-American minorities or the proponents of solar energy. They monitor them for corporate clients and, in so doing, they read the Federal Register, follow agency rulemakings, and initiate more than a few actions of their own.²² While it is true that corporate counsel headquartered in other parts of the country may not be able to specialize in the activities of government, that is precisely why the Washington firms flourish, and represent, and send information alerts out to corporate clients nationwide. That is also why the section 501(c)(6) trade associations exist, why they have made Washington the trade association capital of the country, and why they hire counsel to specialize in the field. As for “sweetheart” litigation, collusion between the government and a

18. See *supra* note 141.

19. J. Fleishman, *The Criticism of Public Interest Law: Some Rebuttals* 51 (unpublished manuscript 1980) (cited with permission of the author).

20. Indeed, some public interest practitioners fault their field for *not* aggressively pursuing legal action against individual business, and relying instead on suits to strengthen government regulating programs. One relatively new organization, Trial Lawyers for Public Justice, has been established to test this premise, and develop theories of civil actions against corporate defendants. See *Trial Lawyers for Public Justice* (undated brochure on file with author).

21. This pattern reflects the thesis that cases against individual businesses are the least cost-effective way of achieving reform.

22. According to a report of the Senate Committee on Government Affairs, there is often no non-industry participation in many federal agency proceedings affecting large segments of the public. 3 *STAFF OF SENATE COMM. ON GOV. AFFAIRS. 95TH CONG., 1ST SESS., STUDY ON FEDERAL REGULATIONS* 12-22 (Comm. Print 1977).

friendly plaintiff, it cannot be seriously maintained that, given the regular interchange of personnel among industries, the government agencies which regulate them, and the Washington firms which represent them, the chances for "sweetheart" decisions are not greatly in favor of business.²³ Indeed, the thrust of the court opinions which first provided public interest access to agency decisionmaking was expressly to break up the "sweetheart" status quo.²⁴

The business PILF rationale then boils down to the alleged handicap of the corporate image, and its "bottom line." It is possible that a business may compromise where a business PILF would not—more possible in theory, however, than in practice. Compromise is not a factor, for example, in those cases where a business PILF appears as *amicus curiae* to a case in progress. Should the industry compromise, the *amicus* brief is moot; should it go to judgment, the *amicus* brief can travel no further. Nor is compromise a factor where the business PILF undertakes to represent directly the business involved. If the client settles, so does the business PILF. Nor is compromise a major consideration when business plaintiffs are suing, for example, to challenge pollution control standards or restrictions on their access to mineral resources—some of the most common types of litigation in which the business PILFs are found. There is seldom much room here for compromise, and in practice the affected industries have stayed the course. Even where the business is involved as a defendant, a compromise is considerably more likely for a Ma-and-Pa grocery than for the AMAX corporation, with ample reserves of its own. The compromise rationale, then, appears to be viable only with respect to those few cases in which a business PILF either takes a "high road" legal position unavailable to corporate interests, or intervenes to support a defendant business which lacks the resources or the will to defend its interest fully. These are not major pieces of the business PILF's universe. Indeed, one is hard to put to find cases where a business PILF is litigating to uphold a standard which a corporate ally has abandoned. More often the corporation will have chosen to stay out entirely, and to let the PILF carry the ball. This posture, however, is no matter of compromise; it is, simply, corporate litigation through a tax-exempt surrogate.

Lastly, then, we are left with the "psychological disadvantage" of businesses as advocates in their dealings with government and the courts. Thus, the argument runs, the rights of AMAX to mine in a wilderness area would be a proper subject for its retained counsel, but the broader question of "locking up" this country's strategic mineral resources is more suited to a business PILF. The strategic minerals imperative will not receive as much credence as it would were it to come from a group less financially-involved than AMAX. This rationale is not offered

23. J. Fleishman, *supra* note 19, at 21. For an added dimension on "sweetheart" decisionmaking, see *Students in Law School Raise Collusion Issue in Watt Wilderness Decision*, N.Y. Times, Dec. 4, 1981, at A22, col. 1. The alleged collusion concerned a Pacific Legal Foundation lawsuit to open a wilderness area to oil and gas exploration. Pacific's action against the Department of Interior was allegedly invited by the Department's Solicitor. Pacific reportedly later wrote a "confidential" letter to the Justice Department complaining of Interior's failure to help Pacific in the case by "building a record" or by "limiting the intervention of environmental groups."

24. See *supra* p. 1442.

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without a certain cynicism. As a Pacific Legal Foundation official explained in a 1975 interview, "there isn't a corporation in the U.S. that can effectively advocate a public interest position. They're discredited as being self-serving. That's part of why we exist."²⁵ The interviewer continued: "And he [the PLF official] notes with a smile, as he picks up the phone to solicit another contribution, 'We're going to have to live with being called the 'front.'"

Cynicism aside, the difficulty in accepting this last rationale is that it rationalizes too much. In the private practice of law, counsel regularly invoke, indeed as regularly as possible, public policy on behalf of their clients. It is no trick to characterize the position of virtually any corporation as safeguarding some larger right—lower prices (if prices will fall), resource conservation (if the prices will rise instead), free enterprise or "corporate due process."²⁶ This is not to assert that business PILFs have not injected original and unrepresented issues into cases involving business interests. It does suggest that clothing an issue in opposition to "oppressive government," in the Constitution, or in the folds of the American flag does not, by itself, require the entry of tax-exempt counsel. If it means anything, the "public interest" means "not private." It does not mean "private-but-it-would-sound-better-coming-from-you." The task becomes to identify those cases where public interest law is adding a non-private point of view.

II. METHODS OF RESEARCH

This study began in August 1981 and continued to January 1984. It incorporates all relevant information discovered on the business PILF actions. It attempts to apply the IRS standards to them in the most objective way possible. To appreciate its limitations, however, one should understand the ways in which the information was gathered and applied.

A. *The Dockets*

The threshold difficulty in assembling dockets of the business PILFs was simply in locating their cases. No business PILF publishes a complete docket of its legal actions.²⁷ The starting points were their newsletters and annual reports, which tended to reflect the most current activities. These reports also tended to be selective, highlighting cases which showed a positive result, and somewhat exag-

25. Weinstein, *supra* note 186, at 43.

26. The Mountain States Legal Foundation for example has characterized its interest in a law suit over the division of water between agricultural businesses, with whom MSLF sided, and an Indian tribe as follows:

Issue—Are individuals subject to the whims of government in the enjoyment of their rights and may those rights be taken away or reduced whenever the government so decides?

Brief of MSLF as Amicus Curiae before the U.S. Court of Appeals for the Ninth Circuit, *Pyramid Lake Paiute Tribe v. Truckee Carson Irrigation Dist.*, 649 F.2d 1286 (9th Cir. 1981), *modified*, 666 F.2d 351 (1982), *aff'd in part and rev'd in part*, 103 S. Ct. 2906 (1983).

27. For some time, the National Legal Center in the Public Interest published a docket and newsletter featuring the cases of its associated business PILFs. See, e.g., NLCPI, *Legal Activities Reporters*, no. 1, Summer 1981; 5 NLCPI, *National Legal Center News*; 7 NLCPI, *NEWSLETTER* no. 1, Mar. 1981. This service was apparently terminated in 1981.

gerated, characterizing PILF comments submitted in informal administrative proceedings, for example, as ones in which the firm "intervened" or won a "legal victory."²⁸

Resort was then made to Schedule A of the firm's annual federal income tax return, IRS Form 990, which should contain a statement of all proceedings entered and the PILF's interest in the matter. Unfortunately, the IRS was not able to provide complete Schedule A's for several of the business PILFs.²⁹ Those obtained required translation. The Schedule A dockets, like the newsletters, referred to some events which were simply not legal proceedings. They reflected others on which no reported decision had been reached, and which therefore could not be examined without resort to local courts and the pleadings of the parties. In some instances, no local tribunal could be found. More than a few cases were apparently handled by cooperating counsel in private practice and, when located, bore no mention of the PILF. Even the fullest Schedule A listings, as those of the newsletters, were often captioned differently from those in the available case reporters. Cases were verified where possible through the Westlaw and Lexis computer systems. Eventually, searches were made for cases in which a PILF was listed as a litigant, those in which a PILF attorney appeared, and, for some, those in which a PILF was mentioned in any way.³⁰

Another challenge was to identify the role a firm had taken in an identified case. Where the PILF was a named plaintiff or intervenor the positions were plain. A number of opinions however contained no mention of the PILF, although listed in the PILF's literature. Here the PILF's statement of interest on its Form 990 or newsletter provided the best indication. Amicus briefs presented a special problem, for it was important to know not only what side a PILF had taken but also what rationale it was presenting to the court on its interest and the merits. For cases in which amicus briefs were submitted to the Supreme Court, briefs were available and provided the best evidence. For lower court appearances resort was again made to PILF press releases, newsletters, Schedule A's, and on occasion to attorneys who had participated in the litigation.

In all, a two-year effort was made to identify the full range of business PILF legal actions. Cases nonetheless may have been missed. Nuances of positions

28. This is not to deny the effectiveness of participating in agency decisionmaking, the backbone of Washington, D.C., administrative practice. A well-placed word may often avoid an expensive lawsuit. The point here is simply that, in attempting to identify formal adjudicatory proceedings involving these PILFs, the newsletter was not a fully reliable source.

29. It required more than one year, from the time of filing a request for this information under the Freedom of Information Act, to receive of Form 990's on the business PILFs examined in this study. Even then, the forms for recent years for certain of the firms were simply unavailable. I would like to express my thanks to the IRS Freedom of Information Office in Washington, D.C., which at last broke the impasse and provided the information available.

30. It should be mentioned, lest it appear that the obvious was overlooked, that while the business PILFs were, with two exceptions, cooperative in sending copies of their newsletters and reports, they were less than helpful in responding to requests for more comprehensive dockets or for citations to cases referred to in their reports which proved difficult to locate. This statement is not made to derogate these firms, whose confidentiality beyond that required by the IRS is fully their privilege, but only to explain the need to look to secondary sources. The Pacific Legal Foundation did, however, provide specific citations upon request, which the author would like to acknowledge with appreciation.

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within cases may have been missed. None were missed intentionally, however, and it is as likely that an overlooked proceeding, or financial interest behind it, would have reflected unfavorably on a firm as favorably. As a matter of statistics, these omissions may well have worked in a firm's favor.

B. *Inside Interest*

A central tenet of charitable activity is that it not inure to the private benefit of major donors or decisionmakers.³¹ Private donors to a public interest law firm, like donors to any § 501(c)(3) charity, are not a matter of public record.³² Reference was made to quoted statements by PILF leaders on their major contributors, and to those rare documents which came to light in which the organization chose to list its contributors more comprehensively.³³ Corporate donations, even those involving thousands of dollars, remained, however, substantially undisclosed. Moreover, corporations may give to a firm in several ways: through a separate corporate foundation, though individual officers, or through the public information or other operating budget categories of the corporation.³⁴ Donations by the corporate foundation will be publicly available not through the records of a PILF but rather those of the foundation. The catch here is that one must know which foundations to look for, and be prepared to sift through haystacks of material for possible needles. For the other two methods of corporate contribution—through officers and operating budget categories—there are not even haystacks available. No full picture can be drawn, then, of direct and continuing subsidies from specific corporations, their officers, and their foundations.³⁵

Identification of the financial interests represented on business PILF boards and litigating committees was a somewhat easier task. Newsletters and annual reports often listed major corporate positions held by members of boards of directors. As these listings might not reflect additional financial interests, a check was made through the Standard and Poors' directory³⁶ for other corporate interests of these same individuals. Litigation committee members were researched through

31. See *supra* p. 1427.

32. I.R.C. § 6033 (1982) requires an annual return from most § 501(c)(3) organizations, including public interest law firms. Form 990, "Return Of Organization Exempt From Income Tax," implements this section. Contributors of less than two percent of an organization's gross revenue are not required to be disclosed. Under I.R.C. § 6104(b), Form 990 information is generally made available for public inspection. The same section, however, does not authorize the Secretary to disclose the names of contributors, other than private foundations, to an exempt organization. I.R.C. § 6104(b) (1982). Thus, while the IRS has limited access to the names of individual donors contributing more than two percent of a PILF's annual revenue (a rather high threshold for determining the possibility of influence), this information is not publicly available.

33. For example, in 1978, the Mountain States Legal Foundation, in seeking a grant from a private foundation, provided a lengthy list of "contributors of \$250 or more." See *supra* TAN 306. This application provided insight to the nature of funding for this PILF, and of the business interests which could influence its case selection.

34. These alternative methods of providing corporate money to a business PILF may render even the information disclosed only to the IRS—donors above 2% of the gross income—substantially incomplete. See *supra* note 34.

35. See Colwell Report, *supra* note 171.

36. STANDARD & POORS, REGISTER (1982).

Martindale-Hubbell³⁷ for illustrative clients. As is apparent, neither source gave complete information. Major stock interests of board members and their corporate subsidiaries, for example, remained unidentified, as did the investment interest of their banks and insurance companies. Major clients, perhaps the exclusive clients, of litigation committee decision-makers were doubtless missed.³⁸

It remained to divine the connection between an insider interest, once identified, and a PILF lawsuit. Without being privy to the actual circumstances of major contributions to these PILFs, or to the actual decisions through which cases were selected, no conclusions could be reached with certainty that improper influence had indeed taken place. On the other hand, the circumstances of some cases were so suggestive of influence that they could not be ignored. Where a specific corporation could be identified as a major donor, or as managed or directed by a PILF board member, or as a client of a litigation committee member, and that same corporation was involved in the PILF case in question, the assumption was made that the occurrence was more than coincidental, that a relationship existed between the corporation and the case of exactly the type the IRS seeks to prevent. The firm's action was rated invalid on this ground. Where the interests of a more general business community were involved in a given case, and representatives of those interests were found among donors or decisionmakers, a question of less direct inurement arose and the entry was, without more, rated questionable.

When all is said and done, the picture of the inside interests potentially affecting the decisions of the business PILFs remains largely incomplete, and in all likelihood understated. It should be noted that where such a close connection to a private interest could be traced, the PILF cases would have likely failed the adequate-representation-by-the-private-bar criterion as well. The private inurement inquiry, then, added few new instances of deviations from the IRS guidelines. Rather it provided a hard core of those which were most flagrant. In this category particularly, the incompleteness of the information available can only have favored the examined firm.

C. *Evaluation*

The findings on private inurement and adequacy-of-private-representation were captured on a matrix for each case, for each firm. The matrix identified the parties and counsel in a case, the financial interests in it or benefitting directly from it, and the issues raised. Where there were no financial interests directly at stake, the inquiry went no further; the appearance was assumed valid. Where the

37. MARTINDALE-HUBBELL, LAW DIRECTORY (1983).

38. Additionally, no attempt was made to trace fully the financial interests in these cases to the Boards of companion PILFs in the NLCPI group. PLF, for example, has intervened on the side of Monsanto and the American Can Company, *see supra* p. 1469; Monsanto has been well represented in GPLF, *see supra* p. 1492; while American Can has been represented on the Board of NELF. MATLF has appeared in support of ELI Lilly and Co., *see supra* p. 1496; the Lilly Foundation has been a major donor to other business PILFs, *see supra* note 418. The suspicion that these NLCPI firms talk to each other seems a permissible one. Were they treated collectively—which, given the NLCPI umbrella, would not be unreasonable—the number of identifiable “insider beneficiaries” would greatly increase.

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case involved direct financial beneficiaries, and the PILF's offerings paralleled those represented by, or available to, counsel for those interests, the entry was rated invalid. Calls too close to make, or which raised substantial doubts unresolvable on the basis of the information available, were rated as questionable. Cases with insufficient information even to identify the issues were simply not included in the ratings. As an internal check on the rating process, each case was discussed and rated by the author and at least two student researchers involved. Any difference of opinion led to the selection of the more favorable rating, i.e., from "invalid" to "questionable," or from "questionable" to valid." The intention throughout this process—the development of objective criteria, their application in a disclosed fashion, and the resolution of differences among researchers in favor of a PILF—was to reduce subjectivity to a minimum. It is the same approach one would expect an IRS examiner to adopt in evaluating these same actions under its principles of public interest law.

III. STANDARDS FOR EVALUATION

Evaluation of the PILF dockets relied on two IRS policies for charitable activity and the practice of public interest law: that PILF cases not inure to the benefit of insiders, and that their issues not be feasible for representation by the private bar. The inurement standard is straight forward; its difficulty lies in uncovering the interests inside. The commercial feasibility standard is more complex. Questions arise over how large the commercial stakes must be, how well-organized, and how directly involved in the subject of the case.

Consider, for example, a suit challenging EPA water quality standards for the mining industry. Assume that the "Central States Legal Foundation" ("CSLF") brings action on behalf of several named mining corporations. The financial interests are identified. The guidelines seem clearly to require—if they are to require anything at all—that these companies retain their own private counsel. Would it have made a difference, however, had CSLF sued initially on its own behalf, and been subsequently joined by the mining companies as plaintiff-intervenors?

Suppose, to broaden the picture, that the mining companies had sued directly and it is CSLF which intervenes as party-plaintiff. Does it make a difference whether CSLF intervenes (a) on behalf of other mining companies, (b) on behalf of one small enterprise on the verge of bankruptcy, (c) on behalf of a non-profit business league in which mining interests are members, or (d) on behalf of itself and its "members"?

Suppose once more, for an even fuller picture, that the suit is brought by an environmental group challenging the water quality standard as unlawfully lax. CSLF intervenes on the side of EPA. Is CSLF's position already represented in the lawsuit, within the meaning of the guidelines? Does it matter on whose behalf CSLF is intervening? Does it matter that the legal issues CSLF raises are identical to, or distinctly different from, those already in the case?

These questions go to the heart of public interest law because, unless they can be answered in a rational and objective way, there is in effect no operational test

for the practice at all. The IRS guidelines do not reach this level of detail. From the philosophy behind them and the specifics they do offer, however, an approach can be developed for answering these questions with fair consistency on a case-by-case basis.

To recapitulate, the Internal Revenue Service rejected years ago, and after an intensive examination of the subject, attempts to judge public interest litigation on the basis of a "public" goal.³⁹ Excepting those extraordinary (and thus far imaginary) programs which might be directed towards disrupting the legal system itself, the *purposes* of the action are irrelevant.⁴⁰ Access, bringing an otherwise unrepresented position before the courts, is the good. Access is, at bottom, a financial test.⁴¹ Does anyone have "a sufficient economic interest to warrant his bearing the cost of retaining private counsel"? The answer for any given case requires a more finely-tuned consideration of this interest.⁴²

A. *The Economic Interest*

Whether "anyone can pay" depends often on how far one looks, or does not look, to find him. The guidelines could be said in this regard to look either to:

1. The interests of a PILF's *clients* in the case, such as one where CSLF represents the individual mining companies; or
2. The interests of other *parties* in the case, such as those same companies in the role of original plaintiffs or plaintiff-intervenors; or
3. Those economic interests benefitted directly by CSLF's position in the case although *not* parties to the litigation.

While the first class is the one most clearly implicated, the guidelines should be interpreted to include all three.⁴³ Economic interests in mining or any other busi-

39. See *supra* pp. 1443-51.

40. See Rev. Rul. 75-74, 1975-1 C.B. 152, 153 (charitability rests not upon particular positions advocated by firm, but upon provision of facility for resolution of issues of broad public importance).

41.

In the typical public interest case, no individual plaintiff has a sufficient economic interest to warrant his bearing the cost of retaining private counsel This lack of economic feasibility in public interest cases is an essential characteristic distinguishing the work of public interest law firms from that of private firms and is a prerequisite of charitable recognition.

Id.

42. Important to this answer is the evolution of the IRS guidance itself. The original guidelines, read narrowly and literally, could be interpreted to prohibit only PILF direct representation of litigants in actions between private persons "where their financial interests at stake would warrant representation from private legal sources." Rev. Proc. 71-39, 1971-2 C.B. 575, 576 (emphasis added). The subsequent revenue rulings substantially expand upon this requirement however, and do not restrict the "economic interest" on which they focus to actual litigants in a proceeding.

43. The discussion which follows treats "interests" as issues presented in a case under consideration. It does not make a distinction between a PILF which is raising the issue on its own behalf and one raising the issue on behalf of a group of "clients." The discovery of a live body or a group of individuals concerned with a problem will be persuasive for purposes of standing, and perhaps persuasive on the merits in a tactical sense, but it has little bearing on the public law question: whether this stated interest is necessarily different from those of persons who are financing, or who obviously could be financing, the case. Finding a poverty candidate for a lead plaintiff is a sound tactical ma-

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ness are no less able to conduct litigation on their own behalf because by good fortune, or by design, someone else sued first. Their ability to litigate has not changed. When CSLF sues to invalidate water quality standards for mining operations, or the Mountain States Legal Foundation sues to open wilderness areas for mineral exploration, who would contend that AMAX could not have found someone in private practice to do the same? This said, actual participation in a proceeding by the benefitted interests is indeed a helpful factor. Their very presence proves the existence of the interests on which the guidelines hinge. Their absence, however, does not disprove it. The interests may still be there, in some cases quite plainly, in others too inconclusively to call. The point simply is that one is required to look for these interests beyond the four corners of the pleadings.

If an economic interest is present, in the case or in the wings, the next consideration is a rule of reason. How substantial is it? Any potential public interest action—transportation access for paraplegics, schedules for listing toxic substances—will have, at some far stretch of the causal chain, entities which may benefit financially. There are people who make lifts for wheelchairs. There are people who sell bottled drinking water. These interests are however, it is submitted, on a distinctly different scale from, say, Exxon's interest in off-shore oil exploration or that of General Electric in nuclear reactor licensing. For purposes of the guidelines, and to err in favor of the charitable exemption, the economic interest should be major and centralized, not diffuse.⁴⁴ As a general rule unless such an interest leaps out from the case, it should not be determinative.

B. *The Benefit*

A second and closely related inquiry asks how directly or indirectly the economic benefit is conferred. Again, the call involves a degree of common sense. An action participated in by commercial river outfitters for example, seeking to upgrade federal water quality standards, would flag the outfitters as an economic interest. Their benefit is indirect at best, however, both because of the generalized nature of the lawsuit (nationwide standards) and its uncertain profitability to them (upgraded standards, leading to upgraded water quality, leading to increased public enjoyment of rivers, leading to increased demand for river outfitting generally, leading to increased revenue). The chain of dominoes is simply too long. Narrow the focus to the quality of a particular river and to litigation by particular commercial outfitters along it, and the benefit conferred becomes more direct, although its economic impact may be still open to question. Shift the focus on that same stretch to outfitters suing for greater commercial access to the river, and the benefit comes on an inescapably straight line. As a rule of thumb, the question here is whether the benefit is so direct that it could motivate a reasona-

neuver; it does not necessarily transform private-interest litigation into public-interest litigation. *Cf. Valdez v. Applegate*, 616 F.2d 570 (10th Cir. 1980).

44. "Even if the community as a whole has a significant cumulative economic interest, individual interests are generally so varied and diffused that it is not practical to rely upon collective financing of such [public interest] cases." *Id.*

ble person so situated to sue. If so, and if under the first test the interest is sufficiently "major," then the litigation begins to look quite "feasible" for the private bar.

C. *Hard Cases and the Search for Flexibility*

The above approach may be criticized as unduly mechanistic, and unreasonably exclusive. Is it fair to say *every* time there is a private interest in litigation that a separate, public interest may not also be present and in need of a voice? Do not the above steps lead to the removal of public interest law firms from public interest cases of major economic importance?

There is but one way to answer these questions: carefully. There are a range of interests in all economic litigation. There are, arguably, public interests in every lawsuit ever filed: the public interest in deterring negligent driving on the highways (by awarding one's client a generous recovery), and the converse public interest in maintaining affordable insurance premiums (by keeping the award in this case to a minimum). The Service has thrown its hands up in despair, as would anyone, in sorting out the "real" public interests here on the basis of their articulated philosophy—and resorted instead to the access-economic feasibility standard. Any approach that would judge the "public" quality of a PILF's position, even as an exception, threatens to erode the standard and with it the very definition of the exempt class.

There are, this caveat notwithstanding, some hard cases to be faced. Litigation pregnant with commercial interests may affect the rights of the poor, of minorities, or of even more inchoate societal groups. One corporation may challenge the siting approval for another's facility on a coastal estuary: Inherent in the case are issues affecting endangered species which have no major economic base. These issues are potentially capable of being raised by the corporate private litigants; on the other hand, neither has a stake in their outcome except as they affect the decision as to which one gets the site. What is best for the health of the ecosystem, and what the law may call for (perhaps no siting at that location at all) may be points neither side is willing to press. Thus the analysis begs for some flexibility in the economic feasibility test, a "feasible-but-separate-interests" exception.

The challenge in acknowledging such an exception is in limiting it before it swallows the rule, and in applying it in an objective way. Everyone's interest is arguably "separate." Which should be allowed for PILFs, even though well-financed private interests could also have raised them?⁴⁵

The answer can be more easily approached in reverse: which should not? The most obvious candidate for *disqualification* here happens to be one frequently offered by business PILFs as their "separate" interest in litigation: the values of the free enterprise system. Throughout this analysis, the value of free enterprise is taken as a given. The question is whether it is a sufficiently separate rationale

45. The interest required here is similar to that required for intervention of right in the federal system, FED R. CIV. P. 24(a), but with an important difference. The Federal Rules require only that the interest not be adequately represented by existing parties; *see also infra* note 53. The IRS guidelines require in addition that the interest not be economically feasible for the private bar.

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to acknowledge as an exception to the rule against undertaking cases which well-financed interests can handle on their own. In this instance, it would be hard to find a more identical rationale and one more easily represented by corporate litigants. This is not to say that in a given case raising economic issues, the position of a PILF might not be sufficiently distinct to be considered an exception. It is to say that the distinction must be based on more than PILF's statement of economic philosophy, no matter how genuinely and vigorously held.⁴⁶

More difficult are the sometimes-encountered rationales of protecting "consumer interests" though alleged lower prices, or the creation of jobs by removing restraints on mining, or leasing, or pollution, or simply the promotion of business and industrial growth.⁴⁷ These justifications present the same problems of scope as "free enterprise": They justify support of any economic interest, no matter how capable it is of obtaining private representation, no matter how well represented in fact in the case at hand. For the guidelines to draw any line at all, this type of exception must require that the "consumer" or "jobs" interest be different in kind from that of the corporations with a stake in the litigation. It is one thing, and probably a valid public interest undertaking, for consumers to bring suit for a rebate of a utility over-charge; no business PILF has yet brought such an action. It is quite another for a PILF to defend the utility on the grounds that the rebate sought will harm consumers through higher rates. The latter argument is economically feasible for the utility.

These untenable rationales noted, it should remain possible for a PILF to bring or enter litigation alongside economic interests, raising issues distinctly separate from those who would gain or lose economically from the suit. The impacts of rate changes on low-income consumers, on the elderly, or the unemployed would be examples. Public access to an area proposed to be restricted as wilderness might be another.⁴⁸ The possibilities admit of no boundary fixed in advance. Where identified, they will constitute a relief value to a letter-strict application of the economic feasibility test. To qualify for such an exception, the burden should rest fully on the PILF to show that its interest was different on more than philosophical grounds from those who stand to benefit financially from the case, and was different in more than the class of individuals it claimed to represent. The PILF must define the difference in the nature of the claim it raised, the relief it sought, and the concerns it brought to bear on the proceeding. The economic

46. Subject to the same fate come those rationales which depend entirely on the financial success of the litigating economic interest: safeguarding the rights of Americans to "energy abundance" or to "low energy prices," for example. The litigating corporations may pass these benefits on to members of the general public if they prevail in the case, but this does not change their primarily private character. These are the kinds of arguments which Mobil Oil and General Electric can be expected to make forcefully on their own. They do not require a public subsidy for another spokesman.

47. This discussion assumes that the PILF may fairly be said to represent the interests of consumers and the unemployed. With the business PILFs this is certainly not a settled proposition.

48. It is one thing to bring or join litigation on such a basis. It is another for a PILF to use it as for representing commercial access interests. See *Mountain States Legal Found. v. Dickerson*, cited in MSLF, Income Tax Return for 1981, Form 990, Schedule 6 (firm filed suit for commercial rafting organizations to open Colorado River through the Grand Canyon to increased commercial use). In this case, the guidelines lead to a finding that the representation is invalid.

feasibility test creates an all-but-irrebuttable presumption. For an exception to be made, it must be clear that here is something significant which otherwise this case would not have seen.

D. *Amicus Appearances: A Looser Standard*

Examination of the history of the IRS guidelines shows that entries by PILFs as amicus curiae were to be given greater latitude. In cases involving economic interests, it could be appropriate for a PILF to present amicus briefs for other, unrepresented segments of society.⁴⁹ Even in cases between purely private parties, "the organization may serve in the nature of a friend of the court."⁵⁰

This latitude notwithstanding, there must be a baseline which gives even these tax-exempt expenditures a public interest character lest public interest law firms become amicus mills for the most powerful economic interests in the country. For purposes of this study, amicus briefs which failed the economic feasibility test—that is to say presented issues which well-financed interests could have presented in the same litigation—were examined further to see if the brief presented the perspective of a genuinely (1) separate and separately affected, (2) unrepresented segment of the public (3) which the PILF could be fairly said to represent. Even this screen has its loopholes. Accepting briefs on this basis encourages a kind of "client-shopping" for a public—if not an issue—through which a PILF will appear at industry's side to say, "me too." This risk, however, all but required by guidelines' distinction in favor of amicus briefs. It also seems justified by the nature of amicus briefs themselves: given their minimal impact on litigation generally, it is doubtful that the effort to limit them, or to produce them for that matter, is worth the candle.⁵¹

E. *Government Interests and the Public Interest*

Government participation in a lawsuit raises another question for PILFs. It can be argued that with government counsel before the court there is no need for additional public interest representation on that side of the case.⁵² On the other hand, the government can be seen to represent many publics, many more than may be represented by an intervening PILF interested in relief tailored to its

49. *Senate Hearings, supra* main text note 18, at 26–27.

50. *Rev. Proc. 71-39, 1971-2 C.B. 575, 576.*

51. The test for amicus briefs, even expanded in this fashion, did weed out several appearances as not meeting either the "different issue" or the "different public" test. A business PILF might claim, in a case involving an industrial challenge to an EPA standard or an OSHA regulation, for example, that its concern was not that of the automobile maker but rather that of the "industry generally." Claims of the business community are more properly made by § 501(c)(6) trade associations or chambers of commerce. Similarly, the PILF might identify its special interest as "efficiency in government," or the "proper implementation of laws"; neither of these, it is submitted, represent the type of separate public interest qualified under the Service's philosophy for amicus appearances.

52. *See, e.g., United Nuclear Corp. v. Cannon, 696 F.2d 141 (1st Cir. 1982)* (environmental organization may not intervene of right to defend constitutionality of challenged state statute where state attorney general was already committed to defending statute). It should be noted, however, that the organization's motion to intervene in this case was untimely filed.

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constituency.⁵³ The presence of government does not preclude the existence of public interests.⁵⁴ As important, its involvement does not make them private ones. The most logical approach then for cases involving the government, is to consider it a neutral factor, and to look to the economic interests in the case separately to see whether they should or should not have precluded the entry of a PILF. Consider, for example, a case involving governments on both sides, a challenge by the State of California to an accelerated federal oil-leasing schedule on its coasts. PILFs intervene on both sides, to support and to oppose the accelerated schedule. For those in support, there is a fairly obvious financial interest on that side of the question, made more obvious by the presence, say, of ARCO, Exxon and other oil corporations as additional intervenors. For those in opposition, the financial interests are, although arguable (wealthy coastal homeowners, marinas, perhaps), at best more diffuse. For either side, it is the nature of these private economic interests, not the government interests, which should determine the validity of the PILF's involvement.

F. *The "Substantiality" Test: The Ultimate Safety Valve*

It should be remembered that there is a final relief mechanism to the application of any such criteria at the end of the process, in the Service's "substantially" test.⁵⁵ As earlier described, no single case or group of cases for any PILF with a sizable docket will lead to its disqualification as a section 501(c) (3) charity. There is too much play in the system and its implementing regulations. A PILF will have to have led a notably private parade before the Service will call it to a halt. If then.

53. *Cf. Sagebrush Rebellion, Inc. v. Watt*, 713 F.2d 525 (9th Cir. 1983). There, the National Audubon Society was allowed to intervene on the side of the Secretary of Interior in defending against a suit filed to enjoin creation of the Snake River Birds of Prey National Conservation Area in Idaho. Reversing denial of intervention by the district court, Judge Schroeder stated:

In assessing the adequacy of the Interior Secretary's representation, we consider several factors, including whether the Secretary will undoubtedly make all of the intervenor's arguments, whether the Secretary is capable of and willing to make such arguments, and whether the intervenor offers a necessary element to the proceedings that would be neglected. In addition to having expertise apart from that of the Secretary, the intervenor offers a perspective which differs materially from that of the present parties to this litigation. Secretary Andrus is no longer Secretary of the Interior. His successor, Secretary Watt, was previously head of the Mountain States Legal Foundation, the organization which is representing the plaintiff Sagebrush Rebellion in this action. These facts support intervention and also give rise to appellant's sobriquet for the case as *Watt v. Watt*."

Id. at 528.

54. The distinction between representing commercial interests and representing those of a government entity is one with which PILFs of all stripes would probably agree. Agencies of government, though directed to carry out statutory mandates and certainly capable of presenting issues relating to these statutes on their own behalf, operate in the context of powerful political pressures which can lead to overnight changes in argument, issues, and even position in a given case. *See generally* Cappelletti, *Governmental and Private Advocates for the Public Interest in Civil Litigation: A Comparative Study*, 73 MICH. L. REV. 793, 799-800 (1975) (discussing forces affecting attorney general's choice of suits). Thus, entries on the side of government were, without more, rated as valid.

55. *See supra* p. 1435.