Continued from previous page

Reg. 103, § 19.101(6)-1 (1939 Code); Treas. Reg. 111, § 29.101(6)-1 (1939 Code); Treas. Reg. 118, § 39.101(6)-1(b) (1939 Code).

Section 501(c)(3) of the 1954 Code, ch. 591, 68A Stat. 163, continued to exempt the same categories of organizations that had been exempt from taxation under the 1939 Code, and added to the list of exempt entities those organizations which are organized and operated for the purpose of "testing for public safety." In addition, Congress tightened the restrictions on political activities of tax-exempt organizations.[9/]

The Report of the House Ways and Means Committee on the 1954 Code stated that Section 501 "is derived from Sections 101 and 421 of the 1939 Code. No change in substance has been made except that employees' pension trust, etc., are brought in the scope of this section." H.R. Rep. No. 1337, 83d Cong., 2d Sess. A165 (1954) (emphasis added).

Not until 1959 did the Internal Revenue Service broaden its interpretation of "charitable" beyond merely "relief of the poor." In § 1.501(c)(3)-1(d)(2) of its 1959 regulations, the Service concluded:

9/ The 1954 Code does not permit tax-exempt organizations to "participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of any candidate for public office."

> The term "charitable" is used in section 501(c)(3) in its generally excepted legal sense and is, therefore, not to be construed as limited by the separate enumeration in section 501(c)(3) of other tax-exempt purposes which may fall within the broad outlines of "charity" as developed by judicial decisions. Such term includes: Relief of the poor and distressed or of the under-privileged; 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. . . .

Obviously, the purpose of this regulation is to make clear that the meaning of "charitable" is not "limited by the separate enumeration in Section 501(c)(3) of other tax-exempt purposes"; for to so limit the term would render it redundant and without independent significance in the statute. The regulation in no way suggests that other purposes enumerated in Section 501(c)(3), such as "educational" and "religious" purposes, must also qualify as "charitable." Indeed, the same regulation defines "educational" without any reference to the notion of charity:

> The term "educational", as used in section 501(c)(3), relates to--
>
> (a) The instruction or training of the individual for the purpose of improving or developing his capabilties; or

> (b) The instruction of the public on subjects useful to the individual and beneficial to the community. 26 C.F.R. § 1.501(c)(3)-1(d)(3)(1959). 10/

Under the Service's own interpretive regulations, Bob Jones and Goldsboro clearly qualify as "educational" institutions entitled to tax-exempt status under Section 501(c)(3), notwithstanding their racially discriminatory practices.

Since 1894, Congress has consistently and repeatedly manifested its intent to exempt from income taxation corporations organized for purely "educational" purposes, as well as corporations organized for purely "charitable" purposes. Congress has never evidenced an intent to deny tax-exempt status to an otherwise qualified "educational" organization simply because it does

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10/ To the extent that the Service's regulations can be interpreted to require "educational" organizations to also satisfy the requirements of "charitable" organizations, they are inconsistent with the plain language of Section 501(c)(3) and must fall. The Supreme Court outlined the limits of the Executive's interpretive powers in Manhattan General Equipment Co. v. Commissioner, 297 U.S. 129, 130 (1935);

> The power of an administrative officer or board to administer a federal statute and to prescribe rules and regulations to that end is not the power to make law--for no such power can be delegated by Congress--but the power to adopt regulations to carry into effect the will of Congress as expressed by the statute. A regulation which does not do this, but operates to create a rule out of harmony with the statute, is a mere nullity.

not also qualify as a common-law "charitable" organization. The Commissioner's contrary interpretation of Section 501(c)(3)--which, having been adopted some 70 years after Congress' initial enactment of the relevant statutory language, hardly qualifies as "a substantially contemporaneous construction of the statute by those presumed to be aware of congressional intent," National Muffler Dealers Assn. v. United States, 440 U.S. 472, 477 (1979)--is inconsistent with the plain language of the statute, with the statute's legislative history,[11/] and with the Service's own interpretive regulations.

11/ The only piece of legislative history relied upon by the Court of Appeals in affirming the Commissioner's denial of tax-exempt status to Bob Jones was the following excerpt from the House Report accompanying the 1939 Internal Revenue Code:

> The exemption from taxation of money and 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 other public funds, and by the benefits resulting from the promotion of the general welfare. H.R. Rep. No. 1820, 75th Cong. 3d Sess. (1939) (emphasis added)

The Court of Appeals reasoned that Bob Jones, because of its racially discriminatory practices, does not promote the general welfare and, thus, was not intended by Congress to qualify for tax exempt status. See Pet. App A8 id. Terming similar reasoning "somewhat of a nonsequitur" the district court in Bob Jones University cogently noted:

> [O]ne facet of [public policy] is that society may provide relief from taxation to those organizations, such as plaintiff religious organization, that are of benefit to the public. The good resulting to the public from these groups depends upon the

(continued)

C. Congressional Action Subsequent To 1970.

Congress has recently expressed grave reservations concerning the Service's authority to deny tax-exempt status to organizations deemed by the Service to violate public policy. In the Ashbrook Amendment to the Treasury, Postal Service, and General Government Appropriations Act of 1980, Pub. L. No. 96-74, § 103, 93 Stat. 559, Congress prohibited the Service from using any funds appropriated under the Act to implement or enforce any rule or procedure "which would cause the loss of tax-exempt status to private, religious or church-operated schools under Section 501(c)(3) . . . unless

11/ (Continued)

> fulfillment of their purposes. Because one of these organizations may have, in an area of its operations, engaged in conduct that might not have been completely in line with some other aspect of public policy does not automatically mean the public no longer benefits from the organization. [The Commissioner] seems to imply that a change in plaintiff's [racially discriminatory] policies to conform to [the Commissioner's] guidelines would transform the religious organization from one that did not benefit the public into one that did, although the function and purposes of plaintiff remained unchanged throughout. Pet. App. at 65 n. 8.

in effect prior to August 22, 1978." 12/ Both Congressman Ashbrook, the House sponsor of the Amendment, and Senator Helms, who introduced the Ashbrook Amendment in the Senate, clearly expressed the view that the Service lacks authority to deny tax-exempt status to private educational institutions because of racially discriminatory policies. 13/

12/ Similarly, the Dornan Amendment to the Act prohibits the funding of two proposed revenue procedures designed to supplement the Service's existing procedures for verifying whether the actual practices of certain schools conform to their certifications of nondiscrimination.

13/ In discussing his amendment on the House floor, Congressman Ashbrook stated:

> So long as the Congress has not acted to set forth a national policy respecting denial of tax exemptions to private schools, it is improper for the IRS or any other branch of the Federal Government to seek denial of tax-exempt statutes.
>
> . . . .
>
> For an agency to permit itself to be guided by pressures of pending legal action, other Federal agencies, outside pressure groups, or changes in an administration is to confuse its own role as tax collector with that of legislator, jurist, or policy-maker.
>
> There exists but a single responsibility which is proper for the Internal Revenue Service:

(continued)

That Congress failed to enact legislation specifically designed to overrule Green v. Connally, supra, and repeal the revenue rulings and procedures which followed upon that decision does not reflect congressional approval of the Service's interpretation of Section 501(c)(3). To the contrary, in passing the Ashbrook Amendment Congress chose to preserve the status quo pending further consideration of the correctness of Green and the Service's acquiescence in that decision. Senator Helms clearly stated this congressional purpose:

13/ (continued)

> To serve as tax collector. It is the responsibility of Congress to conduct oversight over this agency to prevent transgressions into legislative authority. Cong. Rec., 96th Cong. 1st Sess., No. 12, June 25, to July 13, 1979, at H 5879-80.

Senator Helms was even more explicit, stating in debate on the Ashbrook Amendment:

> Mr. President, the IRS has responded to the absence of specific statutory authority from Congress by constructing a theory which substantially distorts the legislative intent and clear meaning of section 501(c)(3) of the Internal Revenue Code. IRS asserts that for a private school to qualify for tax-exempt status under section 501(c)(3) it must be both a charitable and an educational organization. However, section 501(c)(3) lists the exempt purpose as being independent and separate. Nowhere in the statute can it be inferred that an organization seeking exemption must be both "charitable" as well as meet the requirements of one of the other listed purposes. [125 Cong. Rec. S. 11835 (daily ed. Sept. 5, 1979).]

> . . . IRS has denied the tax-exempt status of over 100 schools which it, or a court, has found to be discriminatory. My amendment today does not change the existing law contained in Revenue Procedure 75-50, and thus it preserves the ability of the IRS to act against offending schools on a case-by-case basis.
>
> My amendment is necessary to allow Congress the time to consider the numerous legislative proposals which have been introduced to deal with this problem. [125 Cong. Rec. S. 11980 (daily ed. Sept. 6, 1979).]

Moreover, even if Congress' failure to legislatively overrule Green and the Service could reasonably be construed as congressional approval of the Service's construction of Section 501(c)(3), such approval would provide little insight into the proper interpretation of Section 501(c)(3) itself. The legislative intent to be devined in interpreting that statute is the intent of the Congress that enacted it, not the intent of some subsequent Congress.

> [S]tatutes are construed by the courts with reference to the circumstances existing at the time of the passage. The interpretation placed upon an existing statute by a subsequent group of Congressmen who are promoting legislation and who are unsuccessful has no persuasive significance here.

United States v. Wise, 370 U.S. 405, 411 (1962). Accord, United States v. Southwestern Cable Co., 392 U.S. 157, 170 (1968) ("the views of one Congress as to the construction of a statute adopted many years before another Congress have 'very little, if any, significance'"); Oscar Mayer & Co. v.

Evans, 441 U.S. 750, 758 (1979) ("'It is the intent of the Congress that enacted [the section] . . . that controls.'"); Waterman Steamship Corp. v. United States, 381 U.S. 252, 269 (1965) ("the abortive action of the subsequent Congress [in considering a 'clarifying' amendment] 'would not supplant the contemporaneous intent of the Congress which enacted the . . . Act'").

Nor does Congress' failure to overturn the Service's interpretation of Section 501(c)(3) indicate that Congress has in some sense ratified the Service's position. For legislation to be construed as a binding ratification of the action of the executive branch, the legislation "must plainly show a purpose to bestow the precise authority which is claimed." Ex Parte Endo, 323 U.S. 283, 303 n.24 (1944). See Fuber v. Allen, 396 U.S. 168, 194 (1969) (the Court will not attribute ratification to Congress despite active congressional involvement in reviewing certain administrative action). Certainly, the Ashbrook Amendment, which is premised on preserving the status quo pending possible future congressional consideration of the Service's present position, does not indicate a purpose affirmatively to bestow any authority on the Service.

Similarly, with regard to Congress' failure to act in response to Green v. Connally, supra, ratification by Congress of a lower court's position may not be inferred when Congress fails to legislate in response to a case, even when legislation

to overturn the lower court [14/] decision has been considered but not enacted. United States v. Price, 361 U.S. 304, 310-11 (1960); United States v. Welden, 377 U.S. 95, 102 n. 12 (1964) ("'We do not expect Congress to make an affirmative move every time a lower court indulges in an erroneous interpretation. In short, the original legislative language speaks louder than such judicial action.'" quoting Jones v. Liberty Glass Co., 332 U.S. 524, 534 (1947)).

D. Pertinent Supreme Court Decisions.

Although the Supreme Court summarily affirmed the decision of the three-judge district court in Green v. Connally, 330 F. Supp. 1150 (D. D.C.), summarily aff'd per curiam sub nom., Coit v. Green, 404 U.S. 997 (1971), the question whether racially discriminatory private schools are entitled to tax exemption under Section 501(c)(3) remains open in the Supreme Court. First, it is well established that a summary affirmance by the Supreme Court, while affirming the judgment appealed from, does not constitute an endorsement of the lower court's reasoning. Mandel v. Bradley, 432 U.S. 173, 176 (1976); Fusari v. Steinberg, 419 U.S. 379, 391-92 (1975) (Burger, C.J., concurring). Moreover, the Court has explicitly noted that the Commissioner's adoption of the

14/ Although Green v. Connally was affirmed per curiam by the Supreme Court, Coit v. Green, 404 U.S. 997 (1970), the Court subsequently has stated that this affirmance lacks precedential weight. Bob Jones University v. Simon, 416 U.S. 725, 740 n.11 (1974).

district court's decision and reasoning robbed the appeal to the Supreme Court of an adversarial controversy and thus robbed the Supreme Court's summary affirmance of precedential weight. Bob Jones University v. Simon, 416 U.S. 725, 740 n.11 (1974); Prince Edward School Foundation v. United States, _____ U.S. _____, 101 S. Ct. 1408 n.1 (1981) (Rehnquist, J., joined by Stewart and Powell, J.J., dissenting from denial of certiorari).

Nor does the case relied upon by the district court in Green--Tank Truck Rentals, Inc. v. Commissioner, 356 U.S. 30 (1958)--govern the issue raised in Bob Jones University and Goldsboro Christian Schools. The issue in Tank Truck was whether fines imposed on owners of tank trucks for violations of state maximum weight laws are deductible by the truck owners as "ordinary and necessary" business expenses under Section 23(a)(1)(A) of the Internal Revenue Code of 1939 (now Section 162(a) of the 1954 Code). Reasoning that deductibility of the fines would frustrate state policy in a severe and direct fashion by reducing the "sting" of the penalties, the Supreme Court ruled that "[a] finding of 'necessity' cannot be made . . . if allowance of the deduction would frustrate sharply defined national or state policies prescribing particular types of conduct, evidenced by some governmental declaration thereof." 356 U.S. at 34. Unlike the explicit limitation placed by Congress on the deductibility of business expenses

(i.e., that they be "ordinary and necessary"), tax-exempt status under Section 501(c)(3) is accorded to "corporations . . . organized . . . for . . . educational purposes" simpliciter, not just educational organizations deemed by the Commissioner as "necessary" or otherwise worthy of favored tax treatment.[15/]

Moreover, even if the "public policy" requirement for tax deductions under Section 162(a) applied to tax exemptions under Section 501(c)(3), it is clear that neither Bob Jones nor Goldsboro could be denied tax-exempt status. "[T]he test of nondeductibility always is the severity and immediacy of the frustration resulting from allowance of the deduction." Id.

15/ Indeed, even in the context of "ordinary and necessary" business expenses under Section 162(a), the Supreme Court has made clear that the "public policy" exception to the general rule of deductibility is "sharply limited and carefully defined." Commissioner v. Tellier, 383 U.S. 687, 694 (1966). As the Tellier Court noted:

> We start with the proposition that the Federal income tax is a tax on net income, not a sanction against wrongdoing. That principle has been firmly imbedded in the tax statute from the beginning. One familiar facet of the principle is the truism that the statute does not concern itself with the lawfulness of the income that it taxes. Id. at 691.

In the absence of specific legislation denying deductibility to certain types of business expenses, "it is only in extremely limited circumstances that the Court has countenanced exceptions to the general principle [of deductibility] reflected in [previous] decisions. Id. at 693-94.

the Court of Appeals in Bob Jones University hinted that its interpretation of Section 501(c)(3) was driven, at least in part, by constitutional considerations. Citing Norwood v. Harrison, 413 U.S. 455 (1973), the Court stated: "The Constitution commands that government not provide any form of tangible assistance to schools which discriminate on the basis of race. . . . [G]overnment must 'steer clear' of affording significant tax support to educational institutions that practice racial discrimination." Pet. App. A11 at n.7. The Court of Appeals' analysis of the equal protection implications of according exempt status to racially discriminatory private schools is simply wrong.

First, the Court of Appeals' conclusion is premised on the notion that a tax exemption--or, in other words, a failure to tax--constitutes "tangible assistance" flowing from the Government directly to the educational institution. The Supreme Court, in the context of the Establishment Clause of the First Amendment, has rejected a similar argument, noting that "[t]he grant of a tax exemption is not sponsorship since the Government does not transfer part of its revenue to churches but simply abstains from demanding that the church support the State." Walz v. Tax Commission, 397 U.S. 664, 675 (1970).

Second, and more importantly, the Supreme Court has never held that the mere knowing provision of funds (much less tax exemption) to an entity that discriminates is a

violation of the Constitution's equal protection guaranties. Rather, the Equal Protection Clause is violated only if the Government funding had the purpose and effect of significantly facilitating, supporting, or reinforcing the racially discriminatory behavior. See, e.g., Personnel Administrator of Massachusetts v. Feeney, 442 U.S. 256, 279 (1979); Washington v. Davis, 426 U.S. 229, 239-244 (1976).[16/] Moreover, the inquiry into discriminatory purpose does not hinge on the foreseeability of the legislation's discriminatory effects. Rather, discriminatory purpose "implies that the decisionmaker . . . selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its" discriminatory effects. Personnel Administrator of Massachusetts v. Feeney, supra, 442 U.S. at 279. Obviously, Congress did not accord tax-exempt status under Section 501(c)(3) to "educational" organizations "because" such a tax exemption would benefit racially discriminatory private schools. Rather, the most that can be said is that Congress sought to advance the cause of education

16/ Norwood v. Harrison, supra, is not to the contrary, having arisen in the context of state and municipal programs in Mississippi that "benefitted private schools engaging in racially discriminatory admissions practices following judicial decrees desegregating public school systems." Flagg Brothers, Inc. v. Brooks, 436 U.S. 149, 163 (1978). See also Gilmore v. City of Montgomery, 417 U.S. 556, 568, 570-71 n.10. To the extent that the Court's decision in Norwood can be read to reject the proposition that discriminatory purpose is a necessary element of a constitutional violation, it should be noted that Norwood was decided prior to the Court's ruling in Washington v. Davis, supra, which held unequivocally to the contrary.

at 35; accord Commissioner v. Tellier, 383 U.S. 687, 694 (1966). Because allowance of the deduction sought in Tank Truck "would but encourage continued violations of state law by increasing the odds in favor of noncompliance," the Supreme Court concluded that deduction of fines imposed by the state would "frustrate state policy in a severe and direct fashion." 356 U.S. at 35-36. As the district court in Bob Jones University found, however, permitting tax-exempt status to [Bob Jones] does not so act as to encourage [Bob Jones] to discriminate on the basis of race. [Bob Jones'] racial views result from sincerely held religious beliefs. Regardless of [Bob Jones'] tax status, its religious beliefs remain immutable." Pet. App. at A62.

As the foregoing discussion demonstrates, the interpretation of Section 501(c)(3) adopted by the Commissioner, the district court in Green, and the Court of Appeals for the Fourth Circuit is not supported, much less compelled, by any decision of the Supreme Court. Accordingly, the Commissioner is free to reverse his earlier rulings denying tax-exempt status to private nonprofit educational organizations that would qualify under 501(c)(3) but for their racially discriminatory practices.

E. Constitutional Considerations.

In affirming the Service's authority to deny tax-exempt status to racially discriminatory private educational institutions,

in an of itself and acted "in spite of" the fact that racially discriminatory private schools would incidentially be benefitted thereby.

Because Bob Jones' and Goldsboro's racially discriminatory practices stem from sincerely held religious beliefs, the Service's construction of Section 501(c)(3) to deny them tax-exempt status raises serious questions under the Establishment and Free Exercise Clauses of the First Amendment. As the Supreme Court held in NLRB v. Catholic Bishop of Chicago, 440 U.S. 490 501 (1979), in the absence of clear congressional intent, a federal statute should be construed to avoid having to "resolve difficult and sensitive questions arising out of the guarantees of the First Amendment Religion Clauses." See also St. Martin Evangelical Lutheran Church v. South Dakota, 451 U.S. ___, 101 S. Ct. 2142, 2147 (1981). A reversal of the Service's position in Bob Jones University and Goldsboro Christian Schools would serve the dual purposes of harmonizing the Service's interpretation of Section 501(c)(3) with the congressional intent of that statue and avoiding a confrontation between Section 501(c)(3) and the First Amendment.

CONCLUSION

From the foregoing, it is clear that the Service's interpretation of Section 501(c)(3) of the 1954 Code is at odds with the statute's language and legislative history and renders the statute of questionable constitutionality in the

circumstances of these cases. Accordingly, the Service should reverse its position in Bob Jones University and Goldsboro Christian Schools and accord tax-exempt status to both schools.

U.S. Department of Justice
Civil Rights Division

Assistant Attorney General *Washington, D.C. 20530*

January 7, 1982

Marjorie --

Enclosed is a proposed draft of a Memorandum for the United States in Bob Jones and Goldsboro. Please call me with any comments or revisions that you might have, including changes (if any) that might be appropriate to ensure that the footnote listing of pertinent revenue rulings is complete.

Brad

DRAFT

Nos. 81-1 and 81-3

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

GOLDSBORO CHRISTIAN SCHOOLS, INC., PETITIONER

v.

UNITED STATES OF AMERICA

BOB JONES UNIVERSITY, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRITS OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES

STATEMENT

This Court granted writs of certiorari in the above-captioned cases and ordered consolidation on October 13, 1981. Petitioners seek reversal of the Court of Appeals' decision upholding Internal Revenue Service regulations that were applied to them, because of certain racially discriminatory practices, tax-exempt status as "religious" or "educational" institutions under Section 501(c)(3) of the Internal Revenue Code of 1954 ("Code") and sister Code provisions regarding federal social security taxes (Section 3121(b)(8)(B) of the Code), federal unemployment taxes (Section 3306(c)(8) of the Code), and denying them status as eligible donees of charitable contributions under Section 170(a) and (c) of the Code.

In the courts below and in our Memorandum acquiescing in the petitioners writs of certiorari, the United States argued that the Commissioner of Internal Revenue acted within his statutory authority in determining that Congress intended to deny tax-exempt status under Section 501(c)(3) to nonprofit private educational institutions that maintain racially discriminatory admissions policies or other racially discriminatory practices. After closely reexamining the challenged regulations and the Code provisions on which the regulations are based, the United States has concluded that the statutory construction adopted by the Commissioner and the Court of Appeals below is in error.

According to the Commissioner's 1970 ruling (see Rev. Rul. 71-447, 1971-2 Cum. Bull. 230), the statutory requirement of being "organized and operated exclusively for . . . charitable . . . purposes" was intended (1) to apply to all tax-exempt organizations and (2) to incorporate the common-law requirement that the "charitable" organization not adhere to policies contrary to public policy. Our examination of both the language of Section 501(c)(3), which joins the various purposes qualifying for tax exempt status in the disjunctive, and the statute's legislative history provides no support for the Commissioner's statutory interpretation. We are therefore persuaded that Congress intended to exempt from taxation "educational" organizations that are not also "charitable" as surely as it intended to exempt "charitable" organizations that are not also "educational."

Accordingly, the United States is compelled by the language and legislative history of Section 501(c) to confess error with respect to its previous interpretation of that statute. The Commissioner has initiated the necessary steps to grant petitioner Goldsboro tax-exempt status under Section 501(c)(3) of the Code, and to refund to it federal social security and unemployment taxes in dispute. Similarly, the Commissioner has initiated the necessary steps to reinstate

tax-exempt status under Section 501(c)(3) of the Code to petitioner Bob Jones, and will refund to it federal social security and unemployment taxes in dispute. Finally, the Commissioner has commenced the process necessary to revoke forthwith the pertinent Revenue Rulings that were relied upon to deny petitioners tax exempt status under the Code.*/

The United States therefore asks that the cases in Nos. 81-1 and 81-3 be dismissed as moot and that the judgments of the Court of Appeals be vacated.

Respectfully submitted,

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*/ The applicable rulings are Rev. Rul. 71-447, 1971-2 Cum. Bull. 230; Rev. Proc. 72-54, 1972-2 Cum. Bull. 834; Rev. Rul. 75-231, 1975-1 Cum. Bull. 158; Rev. Proc. 75-50, 1975-2 Cum. Bull. 587.

Inter-Office Memorandum

☐ ACTION ☐ BRIEFING ☐ INFORMATION

Date: January 5, 1982

For: DEPUTY SECRETARY MCNAMAR

From: Ann Dore McLaughlin ADMcL

Subject: Bob Jones Decision

We recommend the following strategy for announcing the Bob Jones decision:

1. Release of the following documents: Press Release including statement by the Deputy Secretary, chronology of legal history of both cases, and a copy of Justice's motion to the Court in both cases.

2. File the motions at 4:00 p.m. with simultaneous release of press documents.

3. Hold a background briefing at 4:00 p.m. for legal reporters on key national publications including the New York Times, Washington Post, Wall Street Journal, Atlanta Journal-Constitution and Los Angeles Times. Participants to include: Deputy Secretary McNamar, Treasury General Counsel, and a Justice Department official, probably Brad Reynolds. ?

Strategy:

1. At 4:00 p.m. release of documents allows time for wire service stories to meet a.m. newspaper deadlines and make 6:00 p.m. evening television broadcasts. Release of your statement at 4:00 p.m. insures that the first wire stories out -- and thus the most widely used, especially by the broadcast media -- will contain our rationale. An earlier release would give the media more time to conduct interviews with interest groups and thus politicize the story. A later release -- one too late for the evening TV news -- might cause the networks to hold the story until the next day, which would result in the same kind of expanded political story.

	Initiator	Reviewer	Reviewer	Reviewer	Reviewer
Surname	FITZWATER				
Initials/Date	1/5 MT	/	/	/	/

OS F 10-01.2 (6-77) which replaces OS 3275 which may be used until stock is depleted.

2. The initial press release would stimulate wire service stories under the most controlled situation. The background briefing would allow us to flesh out the stories in the best light possible.

3. Justice suggests keeping the National Alliance decision separate.

cc: Secretary Regan
Roscoe Egger
Peter Wallison

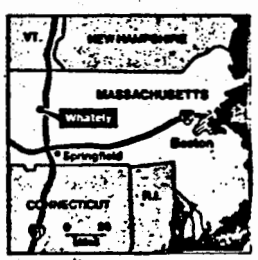
Smith College Fighting Suit Charging Sex Bias

By FOX BUTTERFIELD
Special to The New York Times

WHATELY, Mass., Dec. 24 — The land is overgrown pasture and stands of scrub pine, birch and maple — poor land, the local people say — up above the last remaining farm on a snowy mountain road that no longer leads through to the next village.

But since Smith College acquired an 86-acre parcel here three years ago to provide a buffer around its small observatory, the land has become the focus of an unusual lawsuit with possible implications for the survival of Smith and other colleges in the state as institutions for women only.

In the dispute, which was argued before the Massachusetts Supreme Judicial Court earlier this month, Whately has charged that Smith should be stripped of its tax-exempt status because it violates the state's Equal Rights Amendment by admitting only women as undergraduates. Smith, in turn, has found itself in the awkward position of contending that the state amendment, which bars discrimination on the basis of sex and is similar to the proposed Federal equal rights amendment, should not apply to a private women's college.



The New York Times/Dec. 28, 1981

Land bought in Whately by Smith College is focus of lawsuit.

Other Schools Concerned

Wellesley College, Mount Holyoke and Wheaton, three of the state's prestigious women's schools, joined Smith in filing briefs before the state court. They are concerned that the case could affect their admissions policy and tax-exempt status.

"rather silly to institute the suit." For, he recognizes, even if Whately won the court battle, the $450 a year in taxes would not cover its legal costs.

But, said Mr. White, who is a professor of civil engineering at the University of Massachusetts in nearby Amherst, "It also seems ungenerous of Smith not to do anything for the town when it is such a small sum." Whately plows the road to the college's observatory in winter, he pointed out, and, if there was an accident or fire, the college would expect the town's volunteer police or fire departments to come to the rescue.

Some other townspeople are wondering why Smith has gone to so much trouble and expense to avoid paying anything to Whately. To argue its case before the state court, Smith hired Robert Meserve, a Boston lawyer widely regarded as the dean of the Massachusetts legal profession. Ann E. Shanahan, a spokesman for Smith, would not comment on how much money the college has spent on legal fees.

Jill Conway, the president of Smith, said the points at issue in the litigation "are important ones for the entire higher educational community."

"They concern the right of private educational institutions to tax exemption and the right of private educational institutions to set their own admissions policies," she said.

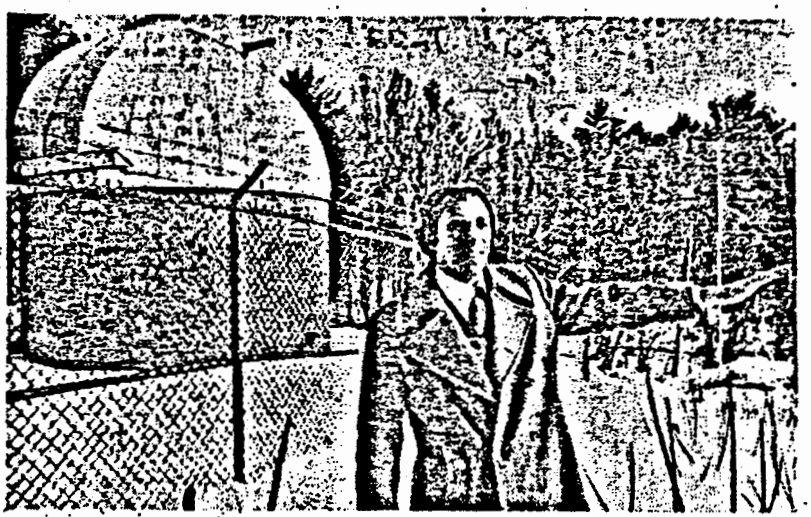
Smith Won Early Round

But Edward W. Pepyne, the Whately Town Counsel, maintains that Smith should lose its tax exemption just like private clubs that discriminate on the basis of sex.

Mr. Pepyne said he had brought the suit after Smith won a decision from the State Appelate Tax Board that the land around the observatory was being used for education and therefore qualified for tax exemption.

Referring to Smith's presentation to the tax board, Mr. Pepyne said, "They argued that they were a trust set up for the purpose of educating young women." But, he continued, "these days you can't talk only about young women or young men. That's a violation of the state E.R.A."

Smith's attorney contended in court that the Equal Rights Amendment did not apply to the college because it was a private rather than a government institution, Mr. Pepyne noted. But, he remembered, "we couldn't get out of North-



The New York Times/Ira Wyman

Edward W. Pepyne, the attorney for Whately, Mass., at contested site surrounding the Smith College observatory.

Merit P. White outside his home in Whately. The address is the year the house was built.

Internal Revenue Service
memorandum

date: December 29, 1981

to: R. T. McNamar, Jr.
Deputy Secretary

from: Kenneth W. Gideon
Chief Counsel

Kenneth W. Gideon

subject: Bob Jones University brief

We have not yet received the revised Bob Jones brief from Justice as retyping has not been completed. We have been promised a copy by noon. A copy will be forwarded to you on receipt.

The new draft will reflect the input of both Ed Schmults and Stu Smith and will argue only the cases before the Court, not a broad-ranging public policy rationale.

U.S. Department of Justice

Office of Legal Counsel

File
Green case

Office of the
Assistant Attorney General

Washington, D.C. 20530

4 DEC 1981

Peter J. Wallison, Esq.
The General Counsel of the Treasury
Department of the Treasury
Washington, D.C. 20220

Dear Mr. Wallison:

In connection with our analysis of the ramifications of the Ashbrook amendment, § 616 of H.R. 4121, for future actions of the Department of the Treasury, you have requested an early response to the question whether your Department may engage in certain pending litigation. Specifically, may the Internal Revenue Service (IRS), through its Office of the Chief Counsel, consistently with the Ashbrook amendment, answer and defend petitions filed in the United States Tax Court by five formerly tax-exempt nonsectarian private schools challenging the revocation of their tax-exempt status under 26 U.S.C. § 501(c)(3), § 501(c)(3) of the Internal Revenue Code of 1954 (Code)? The notices of revocation, dated August 17, 1981, concluded that each of the five schools "no longer qualifies for continued exemption under section 501(c)(3)." These revocations occurred at a time when the IRS was, as it continues to be, subject to an injunction issued by the District Court in Green v. Miller, No. 69-1355 (D.D.C. May 5, 1980) (clarified and amended June 2, 1980), the general thrust of which is to require the IRS to enforce more vigorously the implied prohibition in § 501(c)(3) on the eligibility for tax-exempt status of private, non-profit schools which discriminate on the basis of race.

We do not, in this memorandum, attempt to resolve the plethora of complex questions -- including those articulated by Secretary Regan in his letter to the Attorney General dated October 1, 1981 -- raised by the Ashbrook amendment. The Supreme Court may resolve some of these questions in the cases of Goldsboro Christian Schools Inc. v. United States and Bob Jones University v. United States, Nos. 81-1 and 81-3, cert. granted, 50 U.S.L.W. 3266 (U.S. Oct. 13, 1981), and Regan v.

Wright, No. 81-970, (petition for a writ of certiorari filed by the Solicitor General Nov. 23, 1981). For present purposes, we shall simply assume, without reaching questions of constitutionality, that the Ashbrook amendment was intended, at least in part, to restrict your Department's ability to comply with the injunction issued in Green v. Miller. We conclude, for the reasons set forth below, that the IRS may file answers to and defend the five petitions without violating any constraints the Ashbrook amendment may otherwise have placed on the IRS's administration of the Code.

Background

The history of the Green and Wright cases, and their interrelationship with the Ashbrook amendment, is extraordinarily complex. 1/ However, a detailed recapitulation of that history is unnecessary for resolution of the present problem. Briefly, prior to 1970, the IRS as a general rule recognized non-profit private schools not receiving state aid as tax-exempt, charitable institutions under § 501(c)(3) of the Code and as eligible donees of charitable contributions deductible under § 170(a) and (c)(2) of the Code regardless whether the school was racially discriminatory. In 1971, the District Court in Green v. Connally, 330 F. Supp. 1150, 1171, 1179 (D.D.C.) (three-judge court), aff'd mem. sub. nom. Coit v. Green, 404 U.S. 997 (1971), held, as a matter of statutory interpretation, that the Internal Revenue Code requires denial of tax-exempt status and deductibility of contributions to private schools practicing racial dis-

1/ See Wright v. Regan, 656 F.2d 820, 823-26 (D.C. Cir. (1981) (detailing history of the case); Note, The Judicial Role in Attacking Racial Discrimination in Tax-Exempt Private Schools, 93 Harv. L. Rev. 378, 379-84 (1979). See also Neuberger & Crumplar, Tax Exempt Religious Schools Under Attack: Conflicting Goals of Religious Freedom and Racial Integration, 48 Fordham L. Rev. 229 (1979) (general discussion of court, agency, and congressional action in this area).

crimination. 2/ Plaintiffs in Green reopened the litigation in 1976, alleging that the IRS had failed to enforce effectively the earlier order that racially discriminatory private schools in Mississippi be denied tax exempt status. 3/ That action resulted in a modified and amplified injunction against the IRS which went beyond the guidelines the IRS had adopted in the wake of the first Green decision to determine whether schools seeking or holding exempt status are in fact discriminatory. 4/ The District Court enjoined the IRS from granting

2/ To support this determination, the court reasoned that with respect to private schools, § 501(c)(3) must be read in a manner consistent with federal civil rights legislation and the overriding national policy against racial discrimination in educational facilities. See also Runyon v. McCrary, 427 U.S. 160 (1976); Brown v. Board of Education, 347 U.S. 483 (1954); Section 1 of the Civil Rights Act of 1866, 14 Stat. 27, 42 U.S.C. § 1981; Pub. L. No. 94-658, Sec. 2(a), 90 Stat. 2697 (prohibition of tax-exempt status for social club whose charter or governing instrument provides for discrimination).

3/ At the same time, parents of black children in desegregating school districts in seven States commenced a class action seeking nationwide relief on a basis similar to that sought in Mississippi in the reopened Green case. See Wright v. Regan, 656 F.2d 820, 825, 829-30, 835 (D.C. Cir. 1981). While Green has a long history and involves Mississippi schools alone, the issues in the two cases are essentially the same. Moreover, the original Green court specifically noted that its interpretation of § 501(c)(3) was not confined to the situation in Mississippi. Rather "[t]he underlying principle is broader, and is applicable to schools outside Mississippi with the same or similar badge of doubt." Green v. Connally, 330 F. Supp. at 1174. The Ashbrook amendment does not, on its face, distinguish between schools inside and outside Mississippi.

4/ See, e.g., Rev. Proc. 72-54, 1972-2 C.B. 834; Rev. Proc. 75-50, 1975-2 C.B. 587.

tax-exempt status to private Mississippi schools: (1) adjudged racially discriminatory in adversary or administrative proceedings; or (2) established or expanded at the time of local public school desegregation unless the schools "clearly and convincingly" demonstrate that they observe nondiscriminatory policies and practices in "admissions, employment, scholarships, loan programs, athletics and extra-curricular programs." Green v. Miller, No. 69-1355, at 2 (D.D.C. May 5, 1980) (clarified and amended June 2, 1980). 5/ Subsequent to the court order, the IRS, in the course of its surveys and examinations of private schools, sent the five notices of revocation of tax-exempt status that are presently being challenged in the Tax Court under 26 U.S.C. § 7428. 6/

In order to determine whether those actions can now be answered and defended in Tax Court, they must be viewed against the backdrop of the Ashbrook amendment. Section 616, which Congressman Ashbrook offered as an amendment to the Treasury Department, Postal Service and General Government Appropriations Bill for the fiscal year 1982, provides:

> None of the funds made available pursuant to the provisions of this Act shall be used to formulate or carry out any rule, policy, procedure, guideline, regulation, standard, court order, or measure which would cause the loss of tax-exempt status to private, religious, or church-operated schools under section 501(c)(3) of the Internal Revenue Code of 1954 unless in effect prior to August 22, 1978.

5/ The district court has subsequently stayed its order insofar as it applies to private sectarian schools. See Suspension of Court's Orders of May 5, 1980 and June 2, 1980 (D.D.C. July 13, 1981).

6/ Section 7428 of title 26 provides that an organization whose qualification or classification under § 501(c)(3) is in issue may file within 90 days a petition in the United States Tax Court, the United States Court of Claims, or the district court of the United States for the District of Columbia, seeking a declaratory judgment with respect to such initial qualification, continuing qualification or revocation.

Section 616 passed the House on July 30, 1981. See 127 Cong. Rec. H 5398 (daily ed. July 30, 1981). It was approved by the Senate Committee on Appropriations on September 15, 1981. See 127 Cong. Rec. D 1057 (daily ed. Sep. 15, 1981). Although the House bill has not yet been enacted, the restrictions contained in § 616 were temporarily effective from October 1, 1981, until November 20, 1981, pursuant to Pub. L. No. 95-51, the continuing Appropriations Act. That Act was extended, by amendment, to December 15, 1981. See Pub. L. No. 97-85. On December 15, a joint resolution further extending these conditions for fiscal year 1982, became law. See Pub. L. No. 97-92. 7/

Section 616 is Congress' most recent attempt to limit what it perceives to be unwarranted governmental interference with private sectarian and nonsectarian schools. The amendment is substantially similar to amendments sponsored by Congressmen Ashbrook and Dornan to Treasury appropriations for fiscal years 1980 and 1981. 8/ These "riders" were intended to preserve guidelines the IRS had adopted prior to August 1978 to identify racially discriminatory private schools and to prevent the IRS from augmenting those guidelines with more aggressive procedures and detailed reporting requirements. See 125 Cong. Rec. H 589786 (daily ed. July 13, 1979); id. at H 5979-83 (daily ed. July 16, 1979); id. at S 11979-87 (daily ed. Sep. 16, 1979); id. at S 11802-854 (daily ed. Sep. 5, 1979); id. at S 11979-87 (daily ed. Sep. 6, 1979); 126 Cong. Rec. H 5196 (daily ed. June 18, 1980); id. at H 7209-7218 (daily ed. Aug. 19, 1980); id. at H 7289-7293 (daily ed. Aug. 20, 1980).

7/ Similar to Pub. L. No. 95-51, a proviso to § 101(a)(3) of Pub. L. No. 97-92 states that "when an Act listed in this subsection has been reported to a House, but not passed by that House as of November 20, 1981, it shall be deemed as having been passed by that House." The Treasury, Postal Service and General Government Appropriations Act of 1982 is listed in subsection (a) and has been reported to the floor of the Senate by the Senate Committee on Appropriations. Thus, the amendment involved here is now effective.

8/ See Treasury, Postal Service, and General Government Appropriations Act, 1980, Pub. L. No. 96-74, 93 Stat. 559, §§ 103, 615 (1979); restriction reinstated on December 16, 1980, effective through September 30, 1981, Pub. L. No. 96-536, 94 Stat. 3166, §§ 101(a)(1), 101(a)(4); as amended Pub. L. No. 97-12, 95 Stat. 95, § 401.

Originally, these provisions were explained as attempts to rechannel the responsibility for formulating tax policy from the IRS to Congress or the courts, 9/ and they have been so interpreted by a court. 10/

The fiscal year 1982 Ashbrook amendment differs, however, in scope and impact: the earlier language was altered by inserting "court order." 11/ Inasmuch as the Ashbrook amendment can now be read on its face to prohibit the use of appropriations to "carry out any . . . court order . . . which would cause the loss of tax-exempt status . . . unless in effect prior to Aug. 22, 1978," there may be conflicts between § 616 and the obligations of the IRS under the modified Green injunction. The specific potential conflict at issue here is whether § 616 affects the IRS's ability to defend the actions brought in the Tax Court.

Analysis

The first question to be addressed is whether the notices of revocation sent out by the IRS on August 17, 1981, are themselves nullified by the Ashbrook amendment, which became operative on October 1, 1981. The plain language of § 616 does not indicate that it should apply retroactively. As written, it is future-oriented: no appropriations "shall be used," not "no appropriations should have been used." Nor could a provision forbidding the use of appropriations logically be read to make prior expenditures illegal. Were that possible, persons who had properly authorized the obligation of appropriations under the previous law could be subjected, ex post facto, to criminal prosecution under the

9/ See 125 Cong. Rec. H 5882 (daily ed. July 13, 1979)(remarks of Rep. Ashbrook).

10/ See Wright v. Regan, 656 F.2d 820, 835 (D.C. Cir. 1981) ("riders are holding orders and they hold only the IRS, they do not purport to control judicial dispositions."), petition for certiorari filed, Regan v. Wright, No. 81-970 (Nov. 23, 1981).

11/ See 127 Cong. Rec. H 5392, 5398 (daily ed. July 30, 1981).

Antideficiency Act, 31 U.S.C. § 665, in violation of the Constitution. U.S. Const., Art. I, § 9, cl. 3. 12/

12/ We note that the Ashbrook amendment to the 1980 Appropriations Act, which was the governing law prior to October 1, 1981, did not prohibit any actions taken pursuant to a court order. (Section 103 of the Treasury, Postal Service and General Government Appropriations Act, 1980, Pub. L. No. 96-74, 93 Stat. 562, expired on September 30, 1980, the end of the 1980 fiscal year, but was reinstated for the period December 16, 1980, through the close of the 1981 fiscal year, by § 101 (a) (4), H.R. J. Res. 644 of Dec. 16, 1980, Pub. L. No. 96-536, 94 Stat. 3166, as amended by § 401, Supplemental Appropriations and Rescission Act, 1981, Pub. L. No. 97-12, 95 Stat. 95.) That section read:

> None of the funds made available pursuant to the provisions of this Act shall be used to formulate or carry out any rule, policy, procedure, guideline, regulation, standard, or measure which would cause the loss of tax-exempt status to private, religious, or church-operated schools under section 501(c)(3) of the Internal Revenue Code of 1954 unless in effect prior to August 22, 1978.

When Congressman Ashbrook initially proposed § 103, he described it as a holding order on the IRS, not the courts. "We are just saying do not go forward with these broad regulations or procedures, . . . until the Congress or a court affirmatively acts on that subject." 125 Cong. Rec. H 5882 (daily ed. July 13, 1979) (remarks of Rep. Ashbrook). Thus, neither the plain language nor the legislative history of the 1980 fiscal year Ashbrook amendment -- the applicable law on August 17, 1981 -- prohibited sending out the revocation letters.

Although Congressman Ashbrook attempted to expand the scope of his amendment a year later so as to affect court orders as well, the Chair ruled that the amendment was out of order. 126 Cong. Rec. H 7208 (daily ed. Aug. 19, 1980). Congressman Ashbrook then offered an alternative version which was adopted by the House, with respect to which he stated: "The new version of the amendment does

(Footnote cont'd on p. 8)

In addition, a general rule of statutory construction is that retroactive application of statutes is not assumed absent explicit congressional intent to the contrary. See Nichols v. Coolidge, 274 U.S. 531, 542 (1927) (tax which applied retroactively so as to burden past lawful transactions violated Fifth Amendment); Billings v. United States, 232 U.S. 261, 282 (1914) (statutes should be so construed as to prevent them from operating retroactively). We have carefully reviewed the legislative history and find no evidence whatsoever that Congress intended § 616 to apply retroactively. 13/ We therefore conclude that § 616 in no

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12/ (Footnote cont'd from p. 7)

not challenge the May 5 Green order . . . it does not address or seek to alter the order of Judge Hart in the Green case or the implementation of that order in the State of Mississippi." 126 Cong. Rec. H 7289 (daily ed. Aug. 20, 1980). This amendment never became law, because Congress failed to pass the 1981 fiscal year Appropriations Act. Funding was authorized pursuant to a continuing budget resolution which incorporated existing 1980 restrictions, including the earlier Ashbrook amendment. But at no point prior to the appropriation rider for 1982 did Congress regard either the Ashbrook or Dornan amendments as interfering with the enforcement of outstanding court orders. See also 126 Cong. Rec. S 8660 (remarks of Sen. Javits) (daily ed. July 27, 1980); 126 Cong. Rec. at H 7211 (remarks of Rep. Dornan) (daily ed. Aug. 19, 1980); id. at H 7212 (ruling of the Chair).

13/ See 127 Cong. Rec. H 5392-98 (daily ed. July 30, 1981). Indeed, during floor debate over his 1982 fiscal year version, Congressman Ashbrook himself expressed doubts that even that proposal would affect the ability of the IRS to comply fully with the Green v. Miller injunction within the State of Mississippi. See 127 Cong. Rec. H 5394 (daily ed. July 30, 1981) (exchange between Reps. Ashbrook and Gradison). We assume for present purposes that the 1982 fiscal year version was intended to interdict compliance with the Green v. Miller order after October 1, 1981, without deciding that issue.

way affects the administrative actions taken by the IRS on August 17, 1981. 14/

The next question is whether the IRS can defend challenges to those revocation notices brought under 26 U.S.C. § 7428 and filed in the Tax Court on November 17, 1981. Under rules of the Tax Court, the IRS must respond to at least one of the five petitions by January 11, 1982. We understand from IRS attorneys that the proceedings before the Tax Court will be ones in which any facts upon which the administrative determinations were made may be determined de-novo by the Tax Court at trial of the causes. Any relevant evidence supporting contentions raised during the administrative revocation process may be raised before the Tax Court by either the IRS or the organization. See Incorporated Trustees of the Gospel Workers Society v. United States, 81-1 USTC ¶ 9174, n.6 (D.D.C. 1981). But cf. Prince Edward School Foundation v. C.I.R., 478 F. Supp. 107, 110 (D.D.C. 1979) aff'd by unpublished order No. 79-1622, cert. denied, 450 U.S. 944 (1981) (judicial review limited to review for error of administrative determination). In its answers to the five petitions, the IRS expects to deny most of the paragraphs of the petitions. Trial would not be held in any of the cases until May 1, 1982, at the earliest, with legal memoranda to be submitted subsequent to the trial.

The plain language of § 616, while prohibiting the use of funds either to formulate rules and regulations or to carry out guidelines or court orders which were not in effect prior to August 22, 1978, does not address specifically the appearance of the Executive in court. We would generally be most reluctant to give § 616 a reading that Congress

14/ Analogously, the Court of Appeals in Wright v. Regan, supra at 832-35, reached a parallel conclusion that the enactment by Congress of the Ashbrook amendment (Section 103) and Dornan amendment (Section 615) to the Treasury, Postal Service, and General Government Appropriations Act, 1980, Pub. L. No. 9674, 93 Stat. 559, was prospective in operation: an attempt to stay further IRS initiatives.

intended to bar the Executive Branch from performing its quintessential function of appearing in court to support legally authorized actions it had previously taken. We would be particularly reluctant to give such a reading to a statute making appropriations (and, as here, denying the use of appropriations), because such a statute does not amend underlying substantive law -- it merely suspends the use of appropriations for so long as the statute remains in force. It would also, we believe, be anomalous to attribute to Congress in 1981 an intent on the one hand to leave the notices of revocation unchanged and an intent on the other hand to prohibit the defense of those administrative notices in the Tax Court. Such potentially inconsistent effects should be resolved, if possible, in favor of permitting the agency to defend its prior, permissible actions, rather than forcing a reading that would require the Executive to default in court. Moreover, our earlier conclusion -- that Congress did not intend to nullify the letters of revocation -- leaves the underlying substantive rule of law to be relied upon in the Tax Court outstanding. Cf. Pennsylvania v. Wheeling & Belmont Bridge Co., 59 U.S. (18 How.) 481 (1855) (Congress explicitly changes the substantive rule of law supporting prior decision). If neither § 501(c)(3) nor the notices of revocation have been amended or extinguished, it would be illogical to find in the Ashbrook amendment an intent to prohibit the Executive from responding to challenges to the revocation letters.

Notwithstanding these considerations, however, the complex history of the Ashbrook amendments suggests that we should examine the manner in which the defense in the Tax Court might be construed as carrying out a court order, namely the Green v. Miller injunction, entered after August 22, 1978, and therefore as potentially violative of the spirit of the Ashbrook amendment. Significantly, the modified Green v. Miller injunction does not mention the issue of the IRS defending actions in the Tax Court. Nor would the district court judge presume to dictate the proceedings in another tribunal. Cf. GTE Sylvania, Inc. v. Consumers Union of the United States, 445 U.S. 375 (1980) (agency complying with order in one court's proceeding should not be required to commit contempt of that court because of contradictory order from another court). The Tax Court functions independently in determining what legal standard should govern under the present circumstances and whether or not the petitioner organizations are tax-exempt. See Prince Edward

School Foundation v. C.I.R., 478 F. Supp. 107, 111-12 (D.D.C. 1979), aff'd by unpublished order, No. 79-1622 (D.C. Cir. June 30, 1980), cert. denied, 450 U.S. 944 (1981) (validity of particular revenue procedure does not bear on court's interpretation of the prerequisites for § 501(c)(3) status and its ultimate decision whether or not plaintiff is exempt under that section). Therefore, the IRS, as an initial matter, would not logically turn to the rules developed in the recent Green order for instruction as to its present defense to the challenges under 26 U.S.C. § 7428 in the Tax Court.

Several options, independent of the modified Green injunction and compatible with the Ashbrook amendment, would be available to the IRS in the Tax Court proceedings. The IRS could base its defense of the revocations on a determination that the schools involved have violated Rev. Proc. 75-50 or other pre-August 22, 1978 law, either by failing to demonstrate affirmatively the adoption, communication and observance of a nondiscriminatory policy or by failing to fulfill the equivalent duty of a meaningful communication of a nondiscriminatory policy. 15/ Under this analysis, the IRS would take the position that the schools have allegedly failed to demonstrate that they operate on a racially nondiscriminatory basis in conformity with the original order in Green v. Connally, 330 F. Supp. 1150 (D.D.C.) (three-judge court) aff'd sub. nom. Coit v. Green, 404 U.S. 997 (1971), and Rev. Proc. 75-50, both of which were consciously left undisturbed by the Ashbrook amendment.

15/ Rev. Proc. 75-50, Sec. 2.02 specifically requires that "[a] school must show affirmatively both that it has adopted a racially nondiscriminatory policy as to students that is made known to the general public and that since the adoption of that policy it has operated in a bona fide manner in accordance therewith." See also Green v. Connally, 330 F. Supp. 1150, 1179 (D.D.C. 1971) (three-judge court) (school must publicize policy in manner that is intended and reasonably effective to bring it to attention of students of minority groups).

It is also possible that, at some time during the litigation in the Tax Court, the IRS might desire to argue that the schools had not successfully rebutted a factual inference of discrimination raised by the circumstances surrounding their creation, or their substantial expansion, at approximately the time of a local desegregation order. While such a position could arguably be linked to the language of the modified Green v. Miller injunction, the IRS had actual knowledge of the relevant facts surrounding the schools' formation independent of that court order. See Coffey v. State Educational Finance Commission, 296 F. Supp. 1389 (S.D. Miss. 1969)(three-judge court); Green v. Connally, supra at 1173; Norwood v. Harrison, 382 F. Supp. 921, 924-26 (N.D. Miss. 1974). These cases treated evidence of a school's formation or expansion at times reasonably proximate to public school desegregation litigation as sufficient to create a "badge of doubt." The IRS could assert this well-recognized and accepted inference in its present defense should it choose to rely on that inference. 16/

Another aspect of the Tax Court defenses which arguably could be viewed as "carrying out" the modified Green v. Miller injunction in violation of § 616 would involve the IRS's resort to the "clear and convincing" evidence standard that the modified Green decree imposes on the schools in order to overcome a prima facie case of discrimination. Of course, the IRS has no way of predicting exactly what burdens of proof the Tax Court might eventually place on the litigants. 17/ We are informed that a "clear and convincing" standard of proof is extremely rare in Tax Court proceedings. Moreover, as indicated above, the district court in Green in no way displayed a purpose to prescribe the rebuttal standard to be employed in the Tax Court.

16/ See also Brumfield v. Dodd, 425 F. Supp. 528, 531-32 (E.D. La. 1977) (adopting Norwood v. Harrison, 382 F. Supp. 921 (N.D. Miss. 1974), standard that "the critical time of a private school's formation or unusual enlargement must be a significant factor, though one not necessarily decisive, in determining whether it is racially discriminatory").

17/ See Prince Edward School Foundation v. C.I.R., supra at 110-11; Western Catholic Church v. Commissioner, 73 T.C. 196, 206 (1979); Hancock Academy of Savanah, Inc. v. Commissioner, 69 T.C. 488, 492 (1977) (burden of proof on petitioner; exact standard not addressed).

More importantly, should the IRS, to sustain its case, desire to argue that such a standard should control, it need not invoke the modified Green injunction to support its position. Rather, it can point to the burdens of proof developed in Norwood v. Harrison, supra at 924-26, on remand from the Supreme Court, 413 U.S. 455, 471 (1973); an approach reaffirmed Brumfield v. Dodd, 425 F. Supp. 528, 531-32 (E.D. La. 1977). 18/ These cases predate August 22, 1978, and we do not read the Ashbrook amendment as intending to affect these decisions or to prohibit the IRS from arguing their relevance and applicability in the Tax Court proceedings. Given these precedents and the lack of a firm position by the IRS whether the Norwood inference should apply at all, we see no conflict, at least in the immediate future, between the Ashbrook amendment and the filing of an answer to the five petitions in the Tax Court or, generally, the defense of those actions.

At a more fundamental level, the IRS defense does not violate the basic thrust of § 616. Congress neither intended to change the law proscribing tax-exempt status for discriminatory schools nor desired to impinge on the IRS' ability to withdraw the tax-exempt status of schools that do discriminate. Indeed, in reiterating his initial intention this year, Congressman Ashbrook stated:

> I made it clear at the time that IRS should be able to proceed on the basis of the regulations they had in existence. If they know of discrimination, they can litigate, they can withdraw the tax-exempt status, anything that they could do prior to August 22, 1978, the time when they endeavored to implement these Draconian regulations, could be implemented by IRS. In no way am I trying to impinge on IRS' ability to

18/ Similarly, the court in United States v. State of Mississippi, 499 F.2d 425, 434-35 & n.17 (5th Cir. 1974) (en banc) interpreted Norwood to require that the litmus test for receiving governmental support was actual evidence of nondiscrimination not a simple statement of a nondiscriminatory policy.

withdraw the tax exempt status of any school which might violate the law. 127 Cong. Rec. H 5396 (daily ed. July 30, 1981). 19/

These proceedings will give the court an opportunity to consider what rules should be used to determine nondisdiscrimination -- a result sought by Congressman Ashbrook when he first introduced his amendment. 20/ Thus, the Tax Court proceedings function to further, rather than to undermine, the spirit of the Ashbrook amendment. We therefore conclude that the IRS defense in the Tax Court violates neither the letter nor the spirit of § 616.

19/ See also 127 Cong. Rec. H 5398 (daily ed. July 30, 1981) (remarks of Rep. Lott) ("If this amendment passes, the IRS will still be free to investigate charges of racial discrimination. It will be free to deny exemptions to any institution proven guilty of racial discrimination through fair hearings. In short, it will be free to enforce the regulations and court orders in effect in 1978.").

20/ The governing statute, 26 U.S.C. § 7428(c)(1), explicitly provides that any individual contributions up to $1,000 made to the school during the pendency of the proceedings are deductible, regardless of the eventual outcome of the litigation. Congress fashioned the proceeding involved here in response to the Supreme Court's suggestion that "specific treatment of not-for-profit organizations to allow them to seek pre-enforcement review" might be a method for alleviating "[t]he degree of bureaucratic control that, practically speaking has been placed in the Service [and] . . . is susceptible of abuse, regardless of how conscientiously the Service may attempt to carry out its responsibilities." Bob Jones University v. Simon, 416 U.S. 725, 749-50 (1974). See H.R. Rep. No. 94658, 94th Cong., 1st Sess. 282, 283-84; S. Rep. No. 94-938, 94th Cong., 2d Sess. 585-87 (basis for enacting Sec. 1306(a), Tax Reform Act of 1976, Pub. L. No. 94-455, 90 Stat. 1520).

We are continuing our review of other issues raised in the Secretary's letter to the Attorney General, particularly the potential effect of the Ashbrook amendment on the responsibility of the IRS to notify two "paragraph 1" schools 21/ of their reporting obligations under the modified Green injunction. We will remain in touch with your office and IRS attorneys in our efforts to resolve this matter.

Theodore B. Olson
Assistant Attorney General
Office of Legal Counsel

21/ Paragraph 1 schools are schools which in the past have been determined in court or administrative proceedings to be racially discriminatory, or were established or expanded at or about the time the districts in which they are located were undergoing desegregation and which cannot demonstrate that they do not presently discriminate. See Green v. Miller, No. 69-1355, Order and Permanent Injunction (D.D.C. May 5, 1980) (clarified and amended, June 2, 1980). Even if the school establishes that it observes a nondiscriminatory policy, the IRS is enjoined from continuing its tax-exempt status if the school fails to supply certain information annually for a period of three years.