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U.S. Department of Justice

Tax Division

Justice draft response Special Messenger Lott letter

BOB JONES 7/28/81

1981 NOV 19 PM 5:03

RECEIVED

Assistant Attorney General

Washington, D.C. 20530

November 19, 1981

Honorable Kenneth W. Gideon
Chief Counsel
Internal Revenue Service
Washington, D. C. 20224

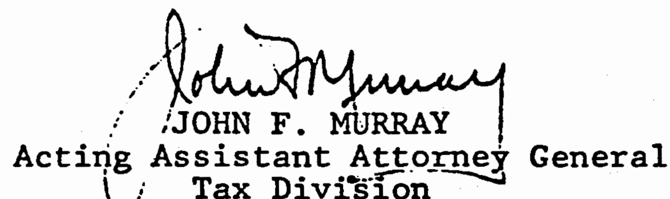
Re: Bob Jones University v. United States

Dear Mr. Gideon:

We are in the process of replying to Congressman Trent Lott's letter to the Attorney General and the Solicitor General concerning the tax-exempt status of church schools and, specifically, the Government's position in the pending Supreme Court cases involving the Bob Jones and Goldsboro Christian Schools. Congressman Lott also wrote the Commissioner in the same vein. You have copies of all pertinent correspondence.

The Department's response will be approved by Deputy Attorney General Schmults. Enclosed for your information is a copy of the proposed reply prepared by the Tax Division for Mr. Schmults' signature. Before a reply is directed to Congressman Lott, we shall touch base with your office.

Sincerely yours,



JOHN F. MURRAY
Acting Assistant Attorney General
Tax Division

Enclosure

U.S. Department of Justice

Office of the Deputy Attorney General

The Deputy Attorney General

Washington, D.C. 20530

Honorable Trent Lott
House of Representatives
Washington, D.C. 20515

Dear Congressman Lott:

The Attorney General and the Solicitor General have requested me to answer your letters of October 30th concerning the cases of Goldsboro Christian Schools, Inc. v. United States, No. 81-1, and Bob Jones University v. United States, No. 81-3, now pending in the Supreme Court. As you have noted, the Solicitor General is disqualified in these cases. It may be of interest to you that the Solicitor General has authorized the filing of a petition for a writ of certiorari to review the decision of the court of appeals in Wright v. Regan, D.C. Circuit, No. 80-1124, and the Government expects to file its petition in that case within the next week.

When the status of private schools with reference to Sections 170 and 501(c)(3) of the Internal Revenue Code came into question around 1970, Commissioner of Internal Revenue Randolph Thrower, after extensive study of the relevant statutory and constitutional provisions, and after review at the highest levels of the Government, announced the position of the Internal Revenue Service thereafter set forth in Revenue Ruling 71-447, 1971-2 Cumulative Bulletin 230. That position has been maintained by each of Commissioner Thrower's successors. It has been upheld in litigation by the Department of Justice under the several Attorneys General then and thereafter in office. It has been approved by two United States Courts of Appeals in three separate lawsuits. Insofar as there have been legislative developments since 1970, which will, of course, be presented to the Supreme Court, we believe that they tend to support, rather than to bring into question, the position taken in 1970 and maintained since that time. We see no basis for abandoning the position consistently maintained for over a decade.

We believe that the cases now pending in the Supreme Court will squarely present the substantive issues involved, and we look to the decision of that Court for authoritative answers to the questions presented. We shall of course be happy to keep you informed of any developments in the cases.

Sincerely yours,

Edward C. Schmults
Deputy Attorney General

Memorandum

ATTORNEY GENERAL/DEPUTY ATTORNEY GENERAL ACTION

Subject	Date
Tax-Exempt Status of Church Schools	November 19, 1981 JFM:mas

To
Edward C. Schmults
Deputy Attorney General

/s/ JFM

From
John F. Murray
Acting Assistant Attorney General
Tax Division

Action Required: Response to October 30 letter from Congressman Trent Lott.

Final Action By:

Attorney General [ ]

Deputy Attorney General [X]

Due Date: 11/23/81
(Department-imposed suspense date for reply)

Previous Background Provided: Prior memoranda and conversations with you and your former aide, Tom Campbell.

Summary: Congressman Lott would like the Department to abandon the position it has espoused throughout the litigation of Bob Jones University v. U. S., Goldsboro Christian Schools, Inc. v. U. S., and Green v. Regan, that schools which discriminate against minorities in their admissions policies are not entitled to tax-exempt status. The draft letter we have prepared adheres to our litigating position.

Comments: My staff and I stand ready to provide any further briefing you wish. Since Congressman Lott also wrote the Commissioner of Internal Revenue in the same vein, our replies should be coordinated before they are finalized.

Concurrences:	DAG	AAG	OLC	OLP	OLA	OPA	JMD					
Initials												
Date												

OFFICE OF THE SECRETARY OF THE TREASURY
WASHINGTON, D.C. 20220

13033
ES

November 6, 1981

MEMORANDUM FOR SALLY KELLEY
DIRECTOR OF AGENCY LIAISON,
PRESIDENTIAL CORRESPONDENCE

Subject: Inquiry to Max Friedersdorf from Senators Armstrong, Helms and Thurmond Concerning Church-Related Schools (ID 026973)

Pursuant to your request, the Commissioner of Internal Revenue will arrange to meet with Senators Armstrong, Helms, and Thurmond. Copies of Secretary Regan's November 6 letters advising the Senators of this arrangement are attached.

David E. Pickford
Executive Secretary

Attachments

THE SECRETARY OF THE TREASURY
WASHINGTON

13038
9a

NOV 6 1981

Dear Jesse:

You will recall that, along with Senators Thurmond and Armstrong, you wrote to Max Friedersdorf on May 22, 1981 to request a meeting with the President. You asked that four attorneys attend, representing a broad range of church-related schools, to discuss the policies of the Internal Revenue Service pertaining to those schools. As indicated in Gregory Newell's letter of August 24, 1981, your correspondence was forwarded to me for my attention.

I have discussed your letter with IRS Commissioner Egger. The Commissioner has indicated to me that he would like to meet with you and the others involved to discuss this matter. Accordingly, the Commissioner's office will be in touch with you shortly to arrange such a meeting.

With best wishes.

Sincerely,

DON

Donald T. Regan

The Honorable
Jesse A. Helms
United States Senate
Washington, D.C. 20510

THE SECRETARY OF THE TREASURY
WASHINGTON

NOV 6 1981

Dear Bill:

You will recall that, along with Senators Helms and Thurmond, you wrote to Max Friedersdorf on May 22, 1981 to request a meeting with the President. You asked that four attorneys attend, representing a broad range of church-related schools, to discuss the policies of the Internal Revenue Service pertaining to those schools. As indicated in Gregory Newell's letter of August 24, 1981, your correspondence was forwarded to me for my attention.

I have discussed your letter with IRS Commissioner Egger. The Commissioner has indicated to me that he would like to meet with you and the others involved to discuss this matter. Accordingly, the Commissioner's office will be in touch with you shortly to arrange such a meeting.

With best wishes.

Sincerely,

DON

Donald T. Regan

The Honorable
William L. Armstrong
United States Senate
Washington, D.C. 20510

THE SECRETARY OF THE TREASURY
WASHINGTON

NOV 6 1981

Dear Mr. Chairman:

You will recall that, along with Senators Helms and Armstrong, you wrote to Max Friedersdorf on May 22, 1981 to request a meeting with the President. You asked that four attorneys attend, representing a broad range of church-related schools, to discuss the policies of the Internal Revenue Service pertaining to those schools. As indicated in Gregory Newell's letter of August 24, 1981, your correspondence was forwarded to me for my attention.

I have discussed your letter with IRS Commissioner Egger. The Commissioner has indicated to me that he would like to meet with you and the others involved to discuss this matter. Accordingly, the Commissioner's office will be in touch with you shortly to arrange such a meeting.

With best wishes.

Sincerely,

DON

Donald T. Regan

The Honorable
Strom Thurmond
United States Senate
Washington, D.C. 20510

August 24, 1981

Dear Senator Armstrong:

I wish to thank you, Senator Helms and Senator Thurmond for your letter which was recently brought to my attention by Max Friedersdorf.

Although the President would like to comply with your request for a meeting to discuss IRS policy toward Church schools, due to his schedule at this time, he has suggested that a meeting be set up for you with Secretary Regan. I am, therefore forwarding your correspondence to his office for special attention.

Again, thank you for your patience.

With the President's warm personal regards, I am

Sincerely,

Gregory J. Newell
Special Assistant
to the President

The Honorable William L. Armstrong
United States Senate
Washington, D.C. 20510

Letterhead copy to Senator Helms
Senator Thurmond

cc and inc to Secreatary Regan

Keep inc. copy for White House Files

GJN:SAP:ds--

to Mark Yecies

room 4021 date 11/5/81

Department of the Treasury
Office of the Secretary
Office of Tax Legislative Counsel

Mark,

81-1250 from Philip M. Crane was assigned to you sometime in February 1981. Our records indicate that it is still unanswered. If it has not been answered, should we mark it "no reply necessary"? Please contract Vivian Reid on 566-2132 to let us know what you decide. Thanks,

Renay France
room
phone

Department of the Treasury
Washington, D.C. 20220

MEMORANDUM

Date: NOV [illegible]

To: Renay France

From: Mark L. Yecies MLY

Subject: Correspondence -- Control Number 1086

I recommend that we close the above-captioned case as "no reply necessary." The incoming letter is very old (January 26, 1981), and requests a meeting which took place on April 6, 1981. (One of the signatories, Trent Lott, referred to that meeting in his letter to Commissioner Egger (attached).) Additionally, there have been further developments in this case which answer some of the points raised in the incoming letter.

Please ask Rick Prendergast in Legislative Affairs whether a reply is still necessary. If not, please send to me copies of the incoming letter and background materials.

Attachment

Buy U.S. Savings Bonds Regularly on the Payroll Savings Plan

TD F 80-02.1
Replaces TD F 10-01.8 which may be used

81-5382
2400 Rayburn Building
Washington, D.C. 20515
202-225-5772

District Offices:
Gulfport, Mississippi
Hattiesburg, Mississippi
Laurel, Mississippi

Congress of the United States
House of Representatives
Washington, D.C. 20515

April 7, 1981

The Honorable Roscoe Egger, Jr.
Commissioner of Internal Revenue
Internal Revenue Service
1111 Constitution Avenue
Washington, D.C. 20224

Dear Mr. Commissioner:

I want to take this opportunity to thank you for taking the time to meet with our delegation this week regarding the case of Green v. Miller. It was readily apparent that you and your staff together with the representatives from the Departments of Treasury and Justice, had worked very hard in reconsidering the government's position in this case. Certainly, Mississippians can no longer say that this injustice has been thrust upon them by mere neglect.

I was happy to learn that so many schools have already had their tax exemptions approved under the Green order, and that more are expected soon. Your sensitivity toward those church schools which have refused to answer your summons on the basis of deeply held First Amendment convictions is entirely appropriate. Given your cooperative spirit, I fervently hope that the final result will be a happy one for all the schools.

I was, of course, disappointed to learn that your lawyers have advised you that there is nothing the IRS can do to vacate the Green order in its entirety. I can understand their feeling that the schools might get a better hearing in a different court, but several of the schools have decided that they must assert their rights in every available forum, and I believe their government should support that right. It is certainly commendable that the Reagan adminstration, unlike its predecessors, will not attempt to obstruct that right.

I can appreciate, although I do not fully accept, the contention that the actions of your predecessors have foreclosed you from going to court to ask that the Green order be lifted and the interested parties be admitted to the case. Since you have no objection to the ultimate goal of full litigation of all issues, I have agreed to join several other members of Congress in seeking to intervene personally

in the Green case. We will argue, along the lines set out so ably by Senator Cochran at the meeting, that the funding restriction does apply to the procedures ordered by the court, that the restriction is constitutional, and that the procedures ought therefore be immediately suspended.

Of course, we would still prefer that the IRS make this argument without the necessity of our intervention. Your predecessors were not neutral in this case, and I see no reason for you to be. On page 28 of their brief filed November 27, 1979, a copy of which was furnished to me by some of the schools involved, they told the court:"Assuming there are such constitutional problems with the two riders, they may be overcome only by a court either declaring the riders unconstitutional or, in the alternative, interpreting the riders narrowly, to permit the implementation of new, more stringent rules in this area, when ordered by the court." While your lawyers have advised you to follow the latter narrow interpretation, the fact remains that Judge Hart has never addressed the effect of these riders. I believe the IRS ought to go to him with a Rule 60(b) motion and ask him to do so. That is certainly what I plan to do as an intervenor.

I want to emphasize how much I appreciate your diligent attention to this matter. I know your predecessors left you in a terribly awkward position, facing an apparent conflict between the intstructions of the Congress and the mandate of the court. I fully sympathize with your stated wish that you could be relieved from the burden of this judgement, and that is why I am going to court to do what I can to remove it.

With kind regards and best wishes, I am

Sincerely yours,

Trent Lott

TL/mbw
cc: The Honorable Ronald Reagan
The Honorable William French Smith
The Honorable Donald Regan

Department of the Treasury
Washington, D.C. 20220

Dennis —
FYI — Bill

Rm 3464

MEMORANDUM

Date: SEP 16 1981

To: John E. Chapoton
Assistant Secretary (Tax Policy)

From: Mark L. Yecies
Attorney-Advisor MLY

Subject: Church-Related Private Schools

This follows up on my memorandum dated September 9, 1981 (attached), relating to the letter sent to Max Friedersdorf by Senators Armstrong, Helms, and Thurmond pertaining to church-related schools (also attached).

Chuck Wheeler (to whom Fred Goldberg referred the materials I sent over) informed me that the Commissioner prefers to meet first with the Senators and attorneys himself. From this meeting we can determine whether any subsequent meetings will be necessary or appropriate and, if so, at what level. Accordingly, I have drafted and attach for your review a response from the Secretary indicating that a meeting with the Commissioner would be appropriate. Chuck Wheeler, Stan Koppelman, and Bill DeReuter have informally approved this letter.

Attachments

cc: w/attachments
Mr. Glickman
Mr. McKee
Mr. Koppelman
Mr. DeReuter
Ms. Vaughn
Mr. Wheeler

Buy U.S. Savings Bonds Regularly on the Payroll Savings Plan

TD F 80-02.1

Department of the Treasury
Washington, D.C. 20220

MEMORANDUM

Date: SEP 9 1981

To: John E. Chapoton
Assistant Secretary (Tax Policy)

From: Mark L. Yecies MLY
Attorney-Advisor

Subject: Church-Related Private Schools

I wish to call to your attention a recent development pertaining to church-related private schools.

By letter to Max Friedersdorf, dated May 22, 1981, Senators Armstrong, Helms, and Thurmond requested a meeting with the President (to be attended also by four attorneys) to ask for a review of IRS policies pertaining to church-related schools.*/ By letter of August 24, 1981, Gregory Newell, Special Assistant to the President, responded that the President suggested that a meeting be arranged with Secretary Regan. Accordingly, the correspondence was forwarded to this Office for action. Attached are copies of this correspondence and background materials.

I am informing you of these developments because the Secretary may make reference to this matter. I have sent copies of the materials to Fred Goldberg at the Service to determine whether the Commissioner wants to handle this himself. When we find out from Fred the Commissioner's desires, we can proceed (if necessary) towards arranging and preparing for this meeting.

---

*/While this letter appears to be directed to the racial discrimination question, the concerns may be broader. The Senators may want to discuss the Service's position, for example, on tax protester churches and mail order ministries. The fourth paragraph states that the IRS has instituted a "monitoring program", which involves sending detailed questionnaries to churches seeking the names and employment of board members and other information. This likely refers to the Service's request for information from certain organizations for which doubt existed as to the status as a bona fide church. However, there was no "monitoring program"; the Service had received a specific complaint with respect to each organization.

Buy U.S. Savings Bonds Regularly on the Payroll Savings Plan

Please advise if you would like additional information at this time. Of course, I will keep you informed as matters develop.

Attachments

cc: (w/attachments)
Mr. Glickman
Mr. McKee
Mr. Koppelman
Mr. DeReuter
Ms. Vaughn

WILLIAM L. ARMSTRONG
COLORADO

United States Senate

WASHINGTON, D.C. 20510

cc - Powel Moore

026973

May 22, 1981

Mr. Max L. Friedersdorf
Assistant to the President
for Legislative Affairs
The White House
Washington, D.C. 20500

Dear Max:

Since 1971, the IRS has proposed and has sought to implement far-reaching new regulations which would require constant IRS monitoring of church school admissions policies, church school activities and school disciplinary rules.

As you know, there was a strong expression by Congress in opposition to the IRS policy toward church schools set forth in the Dornan and Ashbrook amendments to the 1979-1980 Appropriations Bills for the Treasury Department.

Frankly, those of us who have advocated that the IRS return to its duty of collecting taxes and avoid a substantive policy-making role have been encouraged by some recent statements by President Reagan. We are also aware that, before any major modifications are made in a policy as far-reaching as the policy espoused by the IRS toward church schools, appropriate officials in the Reagan Administration would have to review the proposals and likely ramifications.

Just recently, the IRS has instituted another monitoring program which involves the agency sending detailed questionnaires to churches, seeking information about the names and employment of board members of the school, and other private information which we do not believe the Service needs.

We believe it is safe to assume that the Administration is probably reviewing this entire IRS policy, but we would like to suggest a means of speeding up that review. Specifically, we request that a meeting be arranged between President Reagan and four attorneys who represent a broad range of church schools for the purpose of asking for a thorough and objective review of this entire federal government policy. We believe that this meeting is necessary in order to help the Administration formulate a new policy for IRS review of church matters; we believe that a new policy is warranted to prevent the financial ruin of hundreds of church-owned schools and other legitimate religious organizations through the enforcement of bureaucratic fiat.

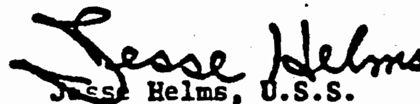
Let us conclude by quoting from a speech President Reagan made at the Religious Roundtable National Affairs Briefing in Dallas, Texas, on August 22, 1980. There President Reagan made a very unequivocal promise to get IRS off the back of church schools and other legitimate ministries of churches. On that particular occasion he said:

> Fully backed by the White House, the Internal Revenue Service was prepared to proclaim, without approval of the Congress, that tax exemption constitutes federal funding. The purpose was to force all tax-exempt schools — including church schools — to abide by affirmative action orders drawn up by — who else? — IRS bureaucrats.
>
> On that particular point, I would like to read you a line from a certain political platform, written in Detroit, about a month ago. It goes like this: 'We will halt the unconstitutional regulatory vendetta launched by Mr. Carter's IRS Commissioner against independent schools.'

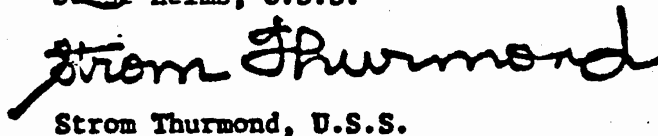
We believe that the time has come to closely review the overly-aggressive IRS policy toward church schools and to develop a policy which will preserve religious freedom. In order to fully inform the President of the position of this group of attorneys, we have enclosed an analysis of the issue by William Ball, along with a briefing memo. It is our hope that a meeting can be arranged in the near future at the President's convenience.

Sincerely,

William L. Armstrong, U.S.S.



Jesse Helms, U.S.S.



Strom Thurmond, U.S.S.

Dear Senator :

Thank you for your letter dated May 22, 1981 to Max Friedersdorf. In that letter you requested a meeting with the President, to be attended also by four attorneys representing a broad range of church-related schools, to ask for a review of IRS policies pertaining to those schools. As indicated in Gregory Newell's letter to you of August 24, 1981, your correspondence was forwarded to me for my attention.

I have discussed your letter with Commissioner Egger. The Commissioner has indicated to me that he would like to meet with you and the others involved to discuss this matter. Accordingly, the Commissioner's office will be in touch with you shortly to arrange such a meeting.

Thank you for your interest in this matter.

Sincerely,

Donald T. Regan

Name
Address

Department of the Treasury
Washington, D.C. 20220

MEMORANDUM

Date: SEP 9 1981

To: John E. Chapoton
Assistant Secretary (Tax Policy)

From: Mark L. Yecies MLY
Attorney-Advisor

Subject: Church-Related Private Schools

I wish to call to your attention a recent development pertaining to church-related private schools.

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---

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Buy U.S. Savings Bonds Regularly on the Payroll Savings Plan

TD F 80-02.1
Replaces TD F 10-01.8 which may be used

Please advise if you would like additional information at this time. Of course, I will keep you informed as matters develop.

Attachments

cc: (w/attachments)
Mr. Glickman
Mr. McKee
Mr. Koppelman
Mr. DeReuter
Ms. Vaughn

THE WHITE HOUSE OFFICE

REFERRAL

AUGUST 26, 1981

TO: DEPARTMENT OF THE TREASURY

ACTION REQUESTED:
APPROPRIATE ACTION

DESCRIPTION OF INCOMING:

ID: 026973

MEDIA: LETTER, DATED MAY 22, 1981

TO: MAX FRIEDERSDORF

FROM: THE HONORABLE WILLIAM L. ARMSTRONG
UNITED STATES SENATE
WASHINGTON DC 20510

SUBJECT: WRITES CONCERNING IRS POLICY TOWARD CHURCH SCHOOLS; REQUESTS THAT A MEETING BE ARRANGED BETWEEN THE PRESIDENT AND FOUR ATTORNEYS WHO REPRESENT A BROAD RANGE OF CHURCH SCHOOLS TO FORMULATE A NEW IRS POLICY

PROMPT ACTION IS ESSENTIAL — IF REQUIRED ACTION HAS NOT BEEN TAKEN WITHIN 9 WORKING DAYS OF RECEIPT, PLEASE TELEPHONE THE UNDERSIGNED AT 456-7486.

RETURN BASIC CORRESPONDENCE, CONTROL SHEET AND COPY OF RESPONSE (OR DRAFT) TO:
AGENCY LIAISON, ROOM 33, THE WHITE HOUSE

BY DIRECTION OF THE PRESIDENT:
LESLIE SORG
DIRECTOR OF AGENCY LIAISON
PRESIDENTIAL CORRESPONDENCE

N.C.C.J.
NATIONAL CONFERENCE OF CHRISTIANS AND JEWS

TR.AXIS

VOLUME 1
NUMBER 1
JULY-AUGUST 1981

A NEWSLETTER ON TAXATION AND RELIGION

Court Ruling Frees Most Religious Schools From Unemployment Taxes

A majority of the parochial and religious schools in the United States do not have to pay unemployment compensation taxes, according to a Supreme Court ruling handed down May 26.

The Court said that schools owned and operated by (having "no separate legal existence" from) churches, conventions or associations of churches are exempt from taxes imposed by the Federal Unemployment Tax Act (FUTA). Schools separately incorporated but clearly controlled by churches may also be exempt.

The unanimous ruling reversed a decision of the South Dakota Supreme Court holding two Lutheran schools not separately incorporated from parent churches subject to FUTA taxes. However, the nation's highest tribunal reserved the question of whether separately incorporated church-related schools are exempt (*St. Martin's Evangelical Lutheran Church* v. *South Dakota*, No. 80-120).

What schools are 'legally organic'? The Court's distinction between schools legally organic to churches and those of separate incorporation raises problems for some religious institutions and systems of church-related schools. For example, among the 665 schools (including preschools) related to the Episcopal Church, the pattern of legal structures is mixed, some schools being organic to parishes and other incorporated separately.

However, most of the nation's primary and secondary schools with religious sponsorship fall within the exempt category, according to an informal survey by TR.AXIS. A vast majority of the more than 8,000 Roman Catholic elementary schools, and some of the 1,500 high schools, are organic to parishes. Almost all of the 1,401 schools of the Lutheran Church-Missouri Synod, which has the largest parochial system of any Protestant denomination, are integral parts of parishes or associations of parishes. Few of the 1,051 schools of the Seventh-Day Adventist Church are incorporated apart from congregations or regional conferences of the denomination.

Jewish day schools affiliated with Torah Umesora-National Society for Hebrew Day Schools, the major system of its kind in the country, characteristically have separate incorporations. The approximately 500 member institutions have independent boards of directors; and officials of Torah Umesorah presume that the schools are not exempt from the unemployment tax under the recent Supreme Court ruling.

A mixed pattern of legal structures exists within the burgeoning Christian school movement. There are today as many as 10,000 such schools, many of them operated by Baptist congregations. The Association of Christian Schools International, which represents a cross section of independent schools, estimates that of its members 78 percent are integral parts of congregations, 2 percent are separately incorporated but accountable to congregations and the remainder are independent religious institutions with boards of directors subscribing to an evangelical Protestant statement of faith.

Separately incorporated schools. Some schools with separate incorporation may be exempt from FUTA taxes under the *St. Martin's* ruling, according to attorneys familiar with the case.

Charles M. Whelan, S.J., professor at the Fordham University Law School, New York, believes an argument can be made for the exemption of separately incorporated schools with charters explicitly placing control in the hands of church authorities. A large number of Catholic high schools are so incorporated by religious orders or dioceses.

Some religious order high schools have "blind charters" not spelling out ecclesiastical control, but Whelan predicted that the charters of these institutions could be amended to conform with the Supreme Court decision. He also thinks that many separately incorporated high schools can meet the statutory exemption test of "being operated primarily for religious purposes" (see box).

Whether separately incorporated religious schools will be asked to pay FUTA taxes depends in large meas-

Elliott Wright — Editor and Project Coordinator
Dean M. Kelley, Charles M. Whelan, S.J. — Consultants and Project Co-Directors
Bruce Nichols — Editorial Consultant
Diana Alicea — Subscriptions
Stephen Doone — Design & Production

A Newsletter on Taxation and Religion, is published 6 times per year by the Project on Church, State and Taxation, a non-advocacy research activity of the National Conference of Christians and Jews, and is distributed by subscription. Rate $15 per year. Address editorial and subscription correspondence to TR.AXIS, 43 West 57th Street, New York, N.Y. 10019.

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SCHOOLS AND UNEMPLOYMENT TAXES, Continued

ure on actions of the U.S. Department of Labor and the various states. Unemployment compensation under FUTA is a joint Federal-state program. Controversy over the inclusion of church and religious schools in its provisions was sparked by the Secretary of Labor following 1976 congressional amendment of the Internal Revenue Code section (3309) establishing FUTA exemptions.

Employee exemptions vary. Congress in 1976 removed an exemption covering persons "in the employ of a school which is not an institution of higher education." It retained exemptions covering ministers and members of religious orders and persons "in the employ of (A) a church or convention or association of churches, or (B) an organization which is operated primarily for religious purposes and which is operated, supervised, controlled or principally supported by a church or convention or association of churches" [I.R.C. 3309(b)].

The Labor Department concluded that removal of the exemption specifically naming schools meant that Congress wanted church schools to pay FUTA taxes on lay employees. Negative reactions to this ruling were immediate; cases sprang up in state and Federal courts across the country. Outcomes varied.

Some courts held church schools subject to FUTA and others ruled against the Secretary of Labor, with the numerical weight of decisions favoring exemption. The Fifth Circuit Court of Appeals ruled in 1980 that the plain language of 3309(b) exempted church schools [*Alabama* v. *Marshall*, 626 F. 2d 366 (CA5 1980)]. The Supreme Court of South Dakota was of other mind.

In overruling the South Dakota court, the Supreme Court said that church schools having "no separate legal existence from a church . . . or a convention or association of churches" are clearly exempt from FUTA taxes under I.R.C. 3309(b)(A). It did not address constitutional issues raised in the *St. Martin's* appeal.

The case adjudicated by the high court concerned two schools (St. Martin's in Watertown and Northwestern Lutheran Academy, Mobridge) of the Wisconsin Evangelical Lutheran Synod. Associate Justice Harry Blackmun wrote the opinion, with Justice Paul Stevens separately concurring. The decision does not answer all lower court litigations involving FUTA and religious schools. Cases dealing with the exemption of independent, separately incorporated schools are in the appeals process.

ELLIOTT WRIGHT

The Internal Revenue Code says that the provisions of the Federal Unemployment Tax Act "shall not apply to services performed—

"(1) in the employ of (A) a church or convention or association of churches, or (B) an organization which is operated primarily for religious purposes and which is operated, supervised, controlled or principally supported by a church or convention or association of churches;

"(2) by a duly ordained, commissioned or licensed minister of a church in the exercise of his ministry, or by a member of a religious order in the exercise of duties required by such order. . . ."

I.R.C. 3309(b)(1-2)

Project on Church, State and Taxation

The Project publishing this newsletter is a non-advocacy, educational program of the National Conference of Christians and Jews established by a grant from the Lilly Endowment, Inc. Its purposes are to:

- Monitor legislation, court actions and public policy trends affecting the tax status of organized religion in the United States;
- Collect factual information about religion and taxation;
- Initiate research on the history and theory of tax exemption;
- And publish a newsletter and occasional papers reporting its findings.

TR.AXIS is the newsletter. It will, at least initially, be issued every other month, or six times annually. The subscription fee, $15 per year, is unusually low for a specialized newsletter and is calculated only to cover costs. Copies will be mailed to subscribers under first-class postal rates.

The Project on Church, State and Taxation was organized for the NCCJ by Elliott Wright, who serves as coordinator. Wright is a journalist and researcher and is working closely with two nonstaff directors, Dean M. Kelley and Charles M. Whelan, S.J., scholars of national reputation in the area of religion and taxation. An organic part of the NCCJ's National Program Office, the Project has an Advisory Committee made up of the following individuals: Marvin Braiterman, professor, New England College, Henniker, N.H.; Robert F. Drinan, S.J., professor, Georgetown University, Washington, D.C.; Dean H. Lewis, a New York-based executive with the United Presbyterian Church; Donald McEvoy, NCCJ national program director; Margaret B. Melady, Fairfield, Conn., a member of the NCCJ program committee; Philip R. Moots, attorney, Columbus, Ohio, and director of the Center for Constitutional Studies, Notre Dame University; Richard J. Neuhaus, theologian and senior fellow of the Council on Religion and International Affairs, New York; Robert W. Nixon, attorney for the Seventh-Day Adventist Church, Washington, D.C.; James A. Serritella, attorney, Chicago; Stanley S. Weithorn, attorney, New York; James S. Woods Jr., director of the Department of Church and State, Baylor University, Waco, Texas; and Sharon L. Worthing, attorney, New York.

Contributors

Tracy Early is a freelance journalist in New York City.

Michael Rosella, a graduate of the Fordham University Law School, was a student assistant on the Project on Church, State and Taxation for the 1980-81 academic year.

Elliott Wright is coordinator of the Project and editor of TR.AXIS.

Lutherans Dispute I.R.S. on 'Integrated Auxiliaries'

The nation's Lutheran denominations are continuing a four-year-old fight against what they consider a too-narrow definition of religious mission in the Internal Revenue Code (I.R.C.) and Federal tax regulations. While the dispute focuses on an I.R.S. informational form, the real issue is broader: Can the I.R.S. decide that certain institutions are nonintegral to a church's ministry and, therefore, subject to financial review by government?

One set of emerging litigations involves social service agencies, with a test case on deck in Minnesota, and a potential suit is developing within the college system of the Lutheran Church-Missouri Synod. The pending actions are part of an inter-Lutheran campaign to guarantee the right of churches to define their own ministries.

At issue is the meaning and application of language included in the Federal Tax Reform Act of 1969. With reference to nonprofit organizations exempt from income taxes under I.R.C. §501(c)(3), Congress in 1969 recognized a special category of churches, associations or conventions of churches and their "integrated auxiliaries" [§§508(c)(1)(A); 6603(a)(2)(A)(i); 6043(b)(1)].

Such organizations need not apply for 501(c)(3) status and are exempted from the annual informational return on income and expenditures (Form 990) required of other nonprofit entities, including religious ones not qualifying for the special category.

In 1976 Congress also made these categories relevant to a section [501(b)(5)] having to do with exemption from a definition of what constitutes "substantial" lobbying.

Lack of Definition. But what is an "integrated auxiliary"? The term is absent from tax law and the general religious vocabulary before 1976. By what structure is an "auxiliary" recognizable as "integrated" to a church or a convention or association of churches? The I.R.S. does not say.

Congress did not define "integrated auxiliary," although examples of what was meant were given in a House-Senate conference report. No doubt for lack of clearer guidance, the Treasury in Reg. 1.6033-2(g)(5) used the examples in constructing an exclusive definition, namely: men's and women's organizations, mission societies, youth groups and religious schools (seminaries are parenthetically stipulated in the regulation; parochial elementary and secondary schools are exempted by order of the I.R.S. Commissioner).

Separately incorporated, albeit church-related, hospitals, orphanages and colleges with unrestricted admission policies are outside the special category under regulations effective since January 1977. The implied rationale is a distinction between strictly religious organizations and facilities of religious origin that may serve a general social need.

The Roman Catholic Church and some Protestant and Jewish groups accepted Form 990 as a fact of life for their institutions of higher education in social service, many of which were already filing Government forms as recipients of public funds. Lutheran and some Baptist churches (see following stories) reacted negatively, not so much because of the Form 990 questions but on principle.

The Missouri Synod, according to St. Louis attorney Philip Draheim, began "maneuvering for a battle" as soon as it saw regulations putting colleges outside the integrated auxiliary classification. In essence, the complaint is that by the tight definition of "integrated auxiliary," the I.R.S. is trying to secularize all church-related institutions—to deny that higher education and social services can be integral to a church's own definition of ministry.

Finding a guinea pig. An inter-Lutheran decision to pursue the complaint came during a 1979 study of contemporary church-state relations conducted by the Lutheran Council in the U.S.A., in cooperation with several nonmember Lutheran denominations. (The Council is constituted by the Missouri Synod, the American Lutheran Church, the Lutheran Church in America and the Association of Evangelical Lutheran Churches).

Study documents suggested institutional defiance of the Form 990 requirement in order to force the issue into court. The Council itself invited selected social service agencies to initiate test cases. Among the "guinea pigs" was Lutheran Social Service of Minnesota, the largest organization of its kind in the state.

This agency deliberately delayed filing the 990 due in May 1979 and, as expected, was assessed and paid a fine, amounting to $700. The plan was to request a refund and, when the I.R.S. refused, to take the matter, as the law permits, to Federal district court.

However, the plan went awry, at least temporarily. The request for refund was duly honored by the regional I.R.S. office; Minnesota Lutheran Social Services got its money back in March 1981, causing some Lutheran officials to imagine that the I.R.S. had conceded the point on the integral nature of social ministries.

Not so: The refund was apparently made, says Minneapolis attorney Hubert Forcier, because I.R.S. routinely returns, if requested, fines below a certain threshold incurred by nonprofit organizations late in filing Form 990. After a news story on the refund appeared in a Washington, D.C., paper, the national I.R.S. office let the Lutherans know that nothing had been conceded on the integrated auxiliary question.

As of June the case of Lutheran Social Service of Minnesota was back to the late filing penalty. Forcier and others involved expected that the fine would be paid again and that this time the request for refund would be denied, thus paving the way for judicial consideration of the Lutheran claim that churches, not government, define ministry. Other similar test cases involving social service are also underway in Washington State and the Southeast.

Meanwhile, the Missouri Synod is prepared to follow a similar strategy in asserting that its colleges are integral to its ministry. ELLIOTT WRIGHT

Baptist Home Fights I.R.S. 990

Tennessee Baptist Children's Homes, Inc. has refused to file I.R.S. Form 990 and is prepared to defend its decision in court. Located in Brentwood, a suburb of Nashville, the agency is separately incorporated but considers itself an integral part of the mission and ministry of the Tennessee (Southern) Baptist Convention. The state convention voted in May to back the home's resistance to the I.R.S. informational return.

Ecumenical Councils and Form 990

Some state and local councils of churches have incorrectly assumed that they must file Form 990; they are exempt as associations of churches, but councils that have been filing may find it time-consuming to discontinue the practice, as the Indiana Council of Churches discovered. When Harold B. Statler arrived as executive director in 1980, he found that the Indiana organization felt itself obliged to submit the informational return. He knew differently, having successfully waged a campaign to persuade I.R.S. not to expect the form from the York County (Pa.) Council of Churches, which he formerly headed. After months of overtures, Statler received notification (in February) that the Indiana Council was relieved of Form 990. However, the state was not inclined to waive a form comparable to 990. "Here we go again," said the Indiana ecumenical executive.

Racial Policies and Discrimination: Religious Schools *v.* I.R.S.

A Federal judge has agreed to hear a motion to modify a court order that, in effect, recognized I.R.S. authority to revoke the tax exemption of religious schools failing to establish and advertise nondiscriminatory racial policies.

Judge George Hart Jr. of the District of Columbia acted on May 14 at the request of a Mississippi congregation, the independent Clarksdale Baptist Church, and 17 individual intervenors. He is expected to hear arguments this summer. The proceedings will review a 1971 civil rights decision cited by the judge and I.R.S. in requiring affirmative action as a condition for the tax exemption of religious primary and secondary institutions, including those corporately indistinguishable from parent churches.

The Clarksville motion seeks relief from a May 1980 injunction (Civ. Act. No. 69-1355) in which Judge Hart ordered the I.R.S. to revoke the tax exemptions of "all Mississippi private schools or the organizations that operate them" if they "cannot demonstrate that they do not racially discriminate in admissions, employment, scholarships, loan programs, athletics and extracurricular programs."

Under the order, the schools in question must follow strict guidelines in advertising nondiscriminatory policies and annually provide I.R.S. with detailed information on educational philosophy, operations and racial composition of boards of directors.

While specifically applied only to private schools in Mississippi, the order is bound up in a long and multicentered controversy over Federal power to deny tax exemption to religious organizations adjudged not to reflect the "well defined public policy" on racial integration. The Clarksdale church, which, according to its attorneys, is not segregated by policy, seeks a hearing on the First Amendment issues raised if the I.R.S. is allowed to impose tax restraints on religious schools.

Pivotal in the matter before Judge Hart is an ongoing civil rights case now known as *Green* v. *Regan* (originally *Green* v. *Connally*; also cited as *Green* v. *Miller*), the judicial landmark in the I.R.S. attempt to require racial integration of all private schools qualifying for tax exemption under Internal Revenue Code §501(c)(3).

Some guardians of the First Amendment question Government application of a "public policy test," even one fostering a worthy social goal, in determining the tax exemption of churches and their schools. William B. Ball, the constitutional attorney from Harrisburg, Pa. who is representing the Clarksdale motion, says that churches with schools were placed under the *Green* ruling without prior notice or opportunity to raise First Amendment objections. Reopening the case, he believes, will give churches "their day in court."

The *Green* case has an extremely complex history in relation to Federal tax policy and to religious schools. It arose in the late 1960's among black Mississippi parents concerned about the proliferation of "segregation academies." While the plaintiffs were successful in winning court action against the tax exemption of the private academies charged with racism, no religious schools were parties to the litigation, and the original decision [330 F. Supp. 1150 (1971)] reserved the question of whether the ruling applied to church schools.

Implementation is complex. However, revenue rulings from 1971 on indicated an I.R.S. belief that—with or without *Green*—racial integration was a social policy to be advanced by the tax agency in all private institutions. Though not citing *Green*, Revenue Ruling 75-231 in 1975 stipulated that a church school discriminating on the basis of race would not be accorded tax exemption. But a revenue ruling does not have general application, and in August 1978 I.R.S. announced a Proposed Revenue Procedure (43 Fed. Reg. 37296) designed to bring all private primary and secondary schools in line with the *Green* philosophy.

Reaction was so adverse that implementation of the proposed procedure was stayed pending additional investigation, including a congressional review of revised guidelines due to go into effect in early 1980. The result was the Ashbrook-Dornan amendment (renewed in 1980) prohibiting I.R.S. from using funds to enforce the procedure. (Reps. John Ashbrook and Robert Dornan, along with Sen. Jesse Helms, are among the 17 intervenors in the Clarksdale motion.)

Judge Hart's May 1980 injunction gave judicial sanction to the policy the I.R.S. developed across the decade of the 1970's but did not settle constitutional questions. In a switch from its former position, I.R.S. has welcomed the Clarksdale intervention and has sus-

DISCRIMINATION, Continued

pended efforts to enforce the order pending the outcome of the new trial.

The Clarksdale action is the third that William Ball has represented in trying to persuade Judge Hart to modify his order. Motions on behalf of the First Presbyterian Church Day School, Jackson, and Baptist schools in Hattiesburg were denied without oral arguments last year.

ELLIOTT WRIGHT

For background, see "The Judicial Role in Attacking Racial Discrimination in Tax-Exempt Private Schools," 93 Harvard Law Review, *378 (1979).*

Bob Jones Discrimination Ruling Appealed to Supreme Court

Bob Jones University, Greenville, S.C., has asked the U.S. Supreme Court to restore its tax exemption. In May the fundamentalist institution appealed a Fourth Circuit Court decision upholding I.R.S. revocation of its exemption on the grounds of racially discriminatory policies [*Bob Jones University* v. *United States* (4. Cir., 47 AFTR 2d 81-553 (1980)].

The appeal is being handled by William B. Ball. The case covers many of the same issues—tax policy, racial integration and religious liberty—relevant to *Green* v. *Regan* (see preceding story).

Integration v. Freedom of religion. The Bob Jones litigation is causing consternation in religious ranks since it seems to pit the well defined and, generally, religiously sanctioned policy of racial integration against constitutional guarantees of freedom of religion. Because of the South Carolina school's traditional defense of racial segregation, some liberal and black groups are reluctant to participate in *amici* briefs defending the university as a religious organization entitled to practice beliefs without governmental interference.

Like *Green* v. *Regan*, the *Jones* case is old and complex; unlike *Green* it requires legal determination of when and if a university is a religious entity. It emerged as a tax-related civil controversy and has developed into an explosive test of First Amendment rights.

The Fourth Circuit Court of Appeals on December 30, 1980, overturned a 1978 district court ruling (in *Bob Jones University* v. *United States*, 468 F. Supp. 890) that the university was entitled to tax exemption. While the circuit granted the independent institution's religious character, two of the three judges (Kenneth K. Hall and Robert R. Merhige, a district judge sitting by designation) maintained that Bob Jones University also engages in general education and is, therefore, subject to court rulings (notably, *Green* v. *Connally*) and I.R.S. procedures denying exemption to nondiscriminatory private schools.

In a dissent, Judge H. Emory Widener argued that if Bob Jones University is a religious organization, its free exercise rights outweigh any other consideration, including what he maintained is a "not so well defined" public policy on racial integration.

I.R.S. presses FUTA claim. Bob Jones University has been in court with the I.R.S. on a variety of issues for more than a decade. The case currently on appeal to the Supreme Court dates to the mid-1970's when the tax agency revoked the school's exemption on the grounds that it promoted segregation by prohibiting black and white students from dating or marrying. (Bob Jones had admitted no black students prior to 1970.) The university argues that separation of the races is a biblical precept.

The university paid $21.00 in 1975 under the Federal Unemployment Tax Act, then sued for refund; the Government counterclaimed for $489,675.59 in FUTA payments for the years 1971 through 1975. In 1978, the Federal District Court in South Carolina held that on both statutory and constitutional grounds the I.R.S. was without authority to revoke the exemption.

In reversing the district court, the Fourth Circuit said that for any private university to qualify for tax exempt status under I.R.C. 501(c)(3) it "must be able to show that all of its programs and facilities are operated in a nondiscriminatory manner" as required by Revenue Procedure 75-50.

In reaching this decision, the Appellate Court had to address two questions: 1) whether the I.R.S. was within its statutory authority when it denied the exemption, and 2) whether, if statutorily permissible, the action violated First Amendment rights.

With regard to the first, the Circuit Court held I.R.S. within its authority on the basis of *Green* v. *Connally*, which states that the tax code "must be construed and applied in consonance with the Federal public policy against support for racial segregation of schools, public and private" (330 F. Supp. at 1163). By citing *Green*, which reserved the issue of applicability to religious institutions, the Circuit Court agreed with the I.R.S.'s construction of the *Green* philosophy.

On the constitutional question, the majority said revocation of the university's 501(c)(3) status does not violate the free exercise clause of the First Amendment, though it precludes continuation of the benefit of exemption. The Court found no violation of the First Amendment after weighing the compelling interest of government in eliminating all forms of racial discrimination in education against any burden on the right to free exercise caused by the loss of exemption.

According to the court, its decision neither prevents anyone from exercising religious beliefs nor forces Bob Jones to change its policy; rather, the majority said, adherence to a belief such as the doctrine of racial separation cannot be supported by government through the granting of tax exemption.

The Fourth Circuit rejected arguments that the Government was violating the no-establishment clause by favoring in tax law religions "in step" with public policy. It stressed government neutrality toward religion but said this doctrine "does not prevent government from enforcing its most fundamental constitutional and societal values by means of a uniform policy neutrally applied." The opinion would allow the I.R.S. to make an objective examination of whether a religious institution

TAX BRIEFS, Continued

authorization in a ballot referendum. Exemptions are not specified. As of mid-June, the bills were still in the hands of legislative committees.

On May 15 and 18 the Maine House and Senate respectively defeated bills similar to those before the Pennsylvania House. Under the proposed statute (Legislative Document 1598), houses of worship and certain other religious properties would have been exempt. Strongest opposition to the service charge idea came from hospitals, veterans' groups, local service institutions and Christian school groups.

Both Pennsylvania HB 1233 and Maine LD 1598 contain almost identical wording on the conditions for imposing a service charge; for example, that the institution charged must receive the service and at a rate reflecting the value of the service. It could not be immediately established whether there might be a common source for the draft legislation.

Maine's legislature has five times defeated bills seeking to set up some means of charging nonprofit organizations for public services.

Church Offices

The City of Grand Rapids, Mich., has lost a bid to tax a building housing the administrative offices and publishing operations of the Christian Reformed Church. Local tax officials argued that the property was not exempt because it is not a house of worship and that a denominational facility does not benefit the entire community. The exemption was upheld by both the Michigan Tax Tribunal and the State Court of Appeals.

Unification Church

A middle-level court in Manhattan has ruled that the "primary purpose" of the Unification Church is not religious and, therefore, the organization founded by the Rev. Sun Myung Moon is not entitled to property tax exemption in New York City. A five-member panel of the Appellate Division of the Supreme Court split 3 to 2 on the "primary purpose" issue and 4 to 1 in upholding the local tax commission's refusal to exempt three Unification Church properties (Case No. 1885, May 5, 1981).

"We conclude that political and economic theory is such a substantial part of the petitioner's doctrine that it defeats petitioner's claim that its purpose is primarily religious," Judge Harold Birns wrote for the majority. "Although religion is one of petitioner's purposes, it is not its primary purpose."

The New York City Tax Commission ruled in 1977 that properties of the Unification Church were not tax exempt because the Moon group is not "primarily" religious. A special tax referee concluded in 1980 that the church is a religious organization but that the properties in question were not used primarily for religious purposes. One building serves as the church headquarters, another is a student center and the third is chiefly for storage.

Last year the tax referee, Donald Diamond, heard testimony from a diverse group of religious representatives who said they believe the Unification Church is a religious organization. Included were representatives of the Roman Catholic Church, the National Council of Churches, the Church of Jesus Christ of Latter-Day Saints (Mormon) and the United Jewish Appeal.

The Unification Church has paid property taxes under protest since 1977 and planned to appeal the recent decision to the New York Court of Appeals.

Pensions

Parsonage Allowance

Many retired pastors of the United Methodist Church may now claim their entire church pension income as a tax-free parsonage allowance, as a result of a series of recent I.R.S. private letter rulings.

While a retired "Minister of the Gospel" has long been eligible for some exclusion of the rental value of housing under I.R.C. §107, the amount and its legal designator had not been clear to United Methodist pension officials. In a request for a private letter ruling, the denomination's Northern Illinois Conference stated that only 30 percent of the average retired minister's income is paid by the church pension fund.

Since Federal statistics show that 30 to 36 percent of average retirement income is required for housing, the Conference asked I.R.S. to allow 100 percent of the United Methodist pension as housing allowance in applicable situations. Previously, only about 40 percent of the pension had been so designated, according to denominational officials.

The I.R.S. responded favorably but declined to make the ruling applicable throughout the United Methodist Church. Although the denomination has a central pensions board, retirement funds are paid through or raised by regional (annual) conferences, which must serve as designators of tax-exempt housing allowances. A majority of the 73 conferences have requested and received private letter rulings identical to that of Northern Illinois.

ERISA

The pension agencies of denominations, dioceses and certain other religious organizations are breathing easier as a result of little publicized 1980 amendments broadening the definition of exempted "church plans" in the Federal Employee Retirement Income Security Act (ERISA). They also have opportunity to change any aspects of their operations that might exclude exemption.

ERISA is a regulatory measure designed to secure the retirement funds of employees but the recent amendments on "church plans" afford rare legislative interpretation of controversial language within the Tax Code section (501) exempting religious (and other nonprofit) organizations from income taxes.

"Church plans" covering specifically "religious" employees were exempted from ERISA when the act was first passed in 1974, but the definition excluded employees of church-related institutions such as hospitals and schools. Last fall, President Carter signed a law

TAX BRIEFS, Continued

(P.L. 96-364) recognizing church plans as those serving not only employees with "religious" functions but also those of any organization "exempt from tax under section 501 . . . which is controlled by or associated with a church or convention or association of churches."

As a matter of definition, this congressional exemption of religion in ERISA is interesting because it recognizes under the rubrics of "church" and "convention or association of churches" institutions not considered integral to these same organizations in the Tax Code itself. (See story on "integrated auxiliaries," page 3.)

Church alliance forms. Revision of the tax law was not, however, the reason representatives of more than two dozen groups joined forces in the Church Alliance for the Clarification of ERISA. A push for the 1980 amendments was needed because many religious groups had not done their homework when ERISA was first before Congress.

Gary Nash, counsel to the Southern Baptist Annuity Board in Dallas and secretary of the Alliance, told **TRAXIS** that only the U.S. Catholic Conference (U.S.C.C.) carefully monitored the proceedings leading to passage of ERISA in 1974. Other groups apparently felt that church pension plans would be adequately protected, but sponsors of the act decided not to exclude church-related institutions.

The U.S.C.C. was especially concerned because most Catholic pension programs are operated by dioceses (in contrast to national Protestant plans), with one for priests and another for lay employees of the diocese and agencies within its bounds. Plans of the first type (covering the religious employees) were exempted in 1974 but the second would not have been after the congressionally stipulated date of 1982. Congress could not be persuaded in 1974 to adopt language satisfactory to the U.S.C.C. but a Senate-House conference committee approved a compromise allowing church plans to continue as they were for eight years.

Separation of churches from ministries. ERISA caused problems for both Catholic and Protestant pension plans. The narrow 1974 definition, says Nash, "divided the churches from their ministries. It treated their healing and teaching agencies as unrelated businesses." ("Unrelated businesses" owned by churches emain subject to ERISA.) Regulations intended to issure the security of employee benefits were not the ssue in the alliance efforts, he added.

Although the Alliance for the Clarification of ERISA ucceeded in its initial goal, it remains in existence to vork for other amendments its members think are eeded to deal with special legal problems of church mployees. Nash and others in the coalition are also interested in the correlation of the broader ERISA definin of "church" with strict provisions on "integrated ixiliaries" in the Tax Code.

He is perplexed, for example, that while the Southern aptist Annuity Board is covered by the ERISA exempn as a national agency of the Southern Baptist Conntion, it was recently notified that I.R.S. does not conler it an "integrated auxiliary" of the denomination.

The contention that the board must file informational Form 990, the return on their income and expenditures, is being challenged through tax appeal channels.

Personal Income

Missionaries

Americans serving as foreign missionaries again have a $20,000 exclusion on their Federal income taxes. An act restoring the exclusion, dropped in 1978, was passed by Congress and signed by the President in the closing days of the Carter Administration.

The new law (P.L. 96-595) allows employees of charitable organizations living in "lesser developed countries" to claim up to $20,000 as tax-free income. The Foreign Earned Income Act of 1978 had cancelled a similar provision, costing missionary and relief agencies millions of dollars in taxes on personnel abroad. Because many missionaries pay high taxes in host countries, double taxation has resulted in some situations.

The $20,000 exclusion may be elected by qualified persons instead of excess living cost deductions provided by IRC §913. Congress made the exclusion retroactive to the tax year 1979.

PROJECT REPORTS

The Project on Church, State and Taxation of the NCCJ publishes occasional research reports on topics relevant to organized religion and tax issues. Papers are distributed at cost. Three are currently available or soon to be published:

FEDERAL LIMITATIONS ON THE POLITICAL ACTIVITIES OF TAX-EXEMPT RELIGIOUS ORGANIZATIONS: A FACT PAPER.
Foreword by Dean M. Kelley and Charles M. Whelan, S.J. A report by the Project staff on controversial clauses in Internal Revenue Code §501(c)(3). $2.00

MAIL ORDER MINISTRIES AND PROBLEMS OF TAXATION.
By Dr. Ronald B. Flowers of Texas Christian University. An exhaustive study of a contemporary social phenomenon raising questions for tax agencies, courts, legislatures and religious organizations. $5.00

RELIGIOUS PROPERTY EXEMPTION IN NEW YORK CITY: A CASE STUDY OF NATIONWIDE TRENDS.
By Tracy Early. A report using a local example to illustrate issues under consideration across the country. Author is a journalist. $2.00

Order reports, prepaid, from Tax Project, 43 West 57th Street, New York, NY 10019. All checks should be made payable to the National Conference of Christians and Jews.

RESOURCES AVAILABLE

As a public service, the Project makes available at nominal cost a book and reprints of articles bearing on church, state and taxation. Currently available:

WHY CHURCHES SHOULD NOT PAY TAXES
By Dean M. Kelley. While the author argues for the point of view set forth in the title, this book, not available elsewhere, contains diagrams, historical data and simple-language explanations on the laws of tax exemption. Both critics and partisans of Kelley's thesis have found it helpful in understanding the modern church-state debate. $5.00

"RELIGION" AND "RELIGIOUS INSTITUTION" UNDER THE FIRST AMENDMENT.
By Sharon Worthing (reprint from *Pepperdine Law Review*, Vol. 7, 1980) A 40-page article discusses definitions under the Constitution and statutes on military draft exemption, employment discrimination, real property tax exemption and zoning. $2.50

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10768 Thomas Heler

THE SECRETARY OF THE TREASURY
WASHINGTON 20220

July 31, 1981

Dear Trent:

Thank you for your letter of July 10, and the additional background on the continuing litigation in the Green case. The issues you raise are serious ones, and I have brought the materials you furnished to the attention of the Commissioner and the Service's Chief Counsel. Thanks again for keeping me advised of your views.

With best wishes.

Sincerely,

Don

Donald T. Regan

The Honorable
Trent Lott
U.S. House of Representatives
Washington, D.C. 20515

1. Rick 2. Helen

TREASURY DOCUMENT PROFILE

DOC MO	DOC DA	RECEIVED MO	RECEIVED DA	RECEIVED YR	ACTION	LOG NUMBER
7	10	7	16	81	Tax Policy	81-10768

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- ☒ SECRETARY (S)
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- ☐ U/SEC. (MA) (M)
- ☐ OTHER (Specify)

FROM: Lott, Trent, H.R.

REFS:

CLASSIFICATION
- ☐ UNCLASSIFIED
- ☐ SECRET
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SUBJECT: Litigation Green v. Regan. (Tax exempt status of all private schools in Mississippi). Encloses ltr to Edward C. Schmults, Justice

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15 7-

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DISPATCH TO: NOTIFY:

SPECIAL DISPOSITION:

- ☐ WHITE HOUSE
- ☐ ALPHA
- ☐ TREASURY
- ☐ CONGRESS
- ☐ OTHER (Specify)

TRENT LOTT
5TH DISTRICT, MISSISSIPPI

COMMITTEES:
RULES
CHAIRMAN, REPUBLICAN RESEARCH COMMITTEE

ADMINISTRATIVE ASSISTANT
TOM H. ANDERSON, JR.

Congress of the United States
House of Representatives
Washington, D.C. 20515

2400 RAYBURN BUILDING
WASHINGTON, D.C. 20515
202-225-5772

DISTRICT OFFICES:
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[illegible]
HATTIESBURG, MISSISSIPPI [illegible]
[illegible]
LAUREL, MISSISSIPPI [illegible]
[illegible]

July 10, 1981

The Honorable Donald Regan
Secretary
United States Department of Treasury
Washington, D.C. 20220

Dear Mr. Secretary:

You will recall my letter of April 23, 1981, regarding the continuing litigation in Green v. Regan. Deputy Attorney General Schmults was kind enough to respond on behalf of the Department of Justice.

Several recent developments have necessitated an elaboration of my views. I have therefore enclosed herewith a copy of my response to General Schmults. I am convinced that the courts are continuing to ignore the clear mandate of Congress in this area, and I earnestly solicit your efforts to set this matter right.

With kind regards and best wishes, I am

Sincerely yours,

Trent Lott

TL/mbw

612501

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[illegible]

July 10, 1981

The Honorable Edward C. Schmults
Deputy Attorney General
United States Department of Justice
Washington, D.C. 20530

Dear General Schmults:

Thank you for your letter of May 12, 1981, in response to my concerns about <u>Green v. Regan</u> and related litigation. I appreciate your taking the time to set out a preliminary statement of the Department's views in this area. In light of certain recent developments, I thought it appropriate for me to elaborate somewhat on my initial remarks.

The decision of the Court of Appeals for the District of Columbia Circuit in <u>Wright v. Regan</u> places the rest of the nation in the same status as Mississippi. I have long maintained this view, but, as you might imagine, it is the only portion of Judge Ginsburg's opinion with which I agree. Since the majority has squarely rejected the arguments on standing which you defended so eloquently in your letter to me, I suppose that the Administration will either ask for rehearing en banc or petition for certiorari. If I am mistaken in this supposition, I would appreciate a full explanation of your decision as soon as possible.

As you proceed to defend the interests of the rest of the country, I am sure you will be equally diligent in protecting Mississippi's interests in the <u>Green</u> case. It has been deeply gratifying to hear continuing reports of your efforts to obtain a full evidentiary hearing on behalf of the Clarksdale Baptist Church. The Church, as you know, has raised the issue of standing in its answer so as to seek dismissal of the underlying complaint. I trust the Administration will give this effort its full support, especially in light of Judge Tamm's reminder in his dissent that rulings on standing may be relitigated at any time. While this effort may be futile in the trial court, it paves the way for an appeal by all defendants so as to enjoy the benefits of an eventual favorable ruling in <u>Wright</u>.

It is my understanding that a petition for certiorari has been filed in Bob Jones University v. United States. As I pointed out in my letter of April 23, 1981, this case squarely presents to the Court the question of statutory construction erroneously resolved by Judge Leventhal early in the Green litigation. It is my belief that the United States should support the petition and confess error. If the Administration is not prepared to abandon the construction devised by Judge Leventhal, I would, of course, appreciate a full explanation of its reasons. At the very least, I believe the Solicitor General should support the petition so as to obtain the early resolution of this issue as you advocate in your letter.

I have been informed that the Senate intends to vote on the nomination of Rex Lee to serve as Solicitor General on July 14. I am sure that you have been keeping him advised of our correspondence, and I look forward to having the benefit of his views soon after he assumes his official duties.

Finally, I truly appreciate your assurances that this Administration will do everything possible to protect my constituents' interests in these cases. As you are well aware, that has not always been the position of the Department or the Service. Judge Tamm in his dissent strongly indicated his doubts as to whether that position has changed even yet. A more vigorous defense by the United States in Green cannot help but advance its position in Wright.

With kind regards and best wishes, I am

Sincerely yours,

Trent Lott

TL/mbw

cc: Hon. Ronald Reagan
Hon. William French Smith
Hon. Donald Regan
Hon. Roscoe Egger, Jr.
Martin Anderson

TRENT LOTT
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[illegible]

April 23, 1981

The Honorable William French Smith
Attorney General
United States Department of Justice
Washington, D.C. 20530

Dear Mr. Attorney General:

Reference is made to my letter to you of April 7, 1981, regarding the case of Green v. Miller, which is now known as Green v. Regan. You will recall that at that time I sent you a copy of my letter of that same date to Acting Assistant Attorney General John Murray of the Tax Division, asking the government to file briefs in support of intervention by church schools in that case.

Mr. Murray responded on April 9, 1981, that support for the schools would not undermine any interests of the government, but he nevertheless refused to file a brief to that effect in the absence of a request from the Court of Appeals. (It is my understanding, however, that the government will file in support of the intervention motion filed last week in the District Court by the Clarksdale Baptist Church.) The Court of Appeals, not surprisingly, made no special effort to persuade the government to file a brief, and affirmed last week the District Court's refusal to permit the First Presbyterian Church of Jackson to intervene.

It is my understanding that the unsuccessful Jackson intervenors are planning to petition the Supreme Court of the United States for certiorari. I strongly urge you to support that effort. A brief review of the Green case and other pending matters will give you some idea of my reasons.

The Green case was originally filed in 1969 by black students and parents from Mississippi, seeking to enjoin the Internal Revenue Service from recognizing the tax exempt status of private schools which discriminate against blacks. Judge Leventhal's opinion for the three-judge District Court agreed that discriminitory schools were not entitled to the statutory tax exemption, but explicitly reserved judgment on the constitutional questions presented by religious schools. Judge Leventhal's opinion has never been reviewed on its merits by the Supreme Court.

The IRS, however, has been acting as though it were the undisputed law of the land ever since. During the Carter Administration, the IRS promulgated a set of rules which would have applied the Green rule nationally and would have effectively shifted the burden of proving non-discrimination to the schools. Enforcement of these regulations was blocked by funding restrictions placed on the IRS by Congress through the Ashbrook and Dornan amendments.

The Green plaintiffs thereupon returned to court to force the IRS to apply its new rules in Mississippi. In its brief on the merits, the IRS largely agreed with the plaintiffs and asked the Court to invalidate the funding restrictions. No private schools were even notified of the proceedings, so there was no adverse party present to resist the relief sought by the plaintiffs. Judge Hart entered the injunction requested by the plaintiffs, but he did not explicitly rule on the validity of the funding restrictions. For the first time he subjected church schools to the order.

The schools first became aware of the case when the IRS began enforcing the order. Schools from Jackson and Hattiesburg immediately moved to intervene, but their efforts were rebuffed. The Jackson case has now been affimed by the Court of Appeals, and it is reasonable to believe that the Hattiesburg case will suffer the same fate unless your Department takes an active hand.

There is every reason to believe that the Supreme Court will wish to determine the fundamental question left unreviewed after the original Green decision. On February 23, 1981, three Justices voted to grant review in Prince Edward School Foundation v. United States, wherein the IRS had revoked the exemption of a school it found to be discriminatory. Speaking for the three, Justice Rehnquist wrote, "I believe the time has come for this Court to deal with the difficult statutory and constitutional questions raised by this petition." The Unites States opposed the petition in that case, but, given the Court's traditional respect for the views of the Solicitor General, the conclusion is practically inescapable that the government's support would lead to the fourth vote necessary for review.

The only question, then, is whether the Jackson case provides the most appropriate vehicle for review. There are several other possibilities.

At the same time that Judge Hart was granting relief in Green, he was refusing to apply those remedies nationally in Wright v. Miller. Plaintiffs have appealed, and the case has already been argued before the Court of Appeals. Whatever the result there, certiorari will likely be sought by the loser. However, it is possible that the Court would be unable to reach the underlying statutory and constitutional questions, because the case also presents difficult issues of third-party standing and funding restrictions.

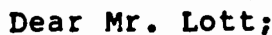
Those issues are also present in the interventions filed by the Clarksdale school and by several Members of Congress, including myself. It might be possible to ask the Supreme Court to hold the Jackson case for the result of this new round of litigation, but the delay would be lengthy and could still leave the underlying questions unresolved.

Perhaps the best vehicle now available is Bob Jones University v. United States, which was decided by a divided panel of the Fourth Circuit on December 30, 1980. There is no third-party question in that case, and the revocation evidently took place before the effective date of the funding restriction. Of course, the case could be rendered moot if the IRS would agree that Judge Leventhal's opinion was wrong and restore the University's exemption.

As you can see from this barrage of litigation, it is imperative to obtain a Supreme Court resolution of the questions opened ten years ago by Judge Leventhal. I will appreciate your detailed thoughts as to the best vehicle for obtaining that review. Certainly, the Department's institutional concerns about changing position in midstream before the Court of Appeals can no longer apply, since the Jackson certiorari petition will require an initial response before the Supreme Court from the government. It might as well be the right one.

Whatever vehicle is chosen by the government, the Jackson and Hattiesburg schools should not be allowed to suffer because theirs were the first appeals to reach the Court. The government should ask that the Green interventions either be argued in tandem with the chosen vehicle or be held for remand after resolution of the issue. In the meantime, the IRS should ask Judge Hart and, if necessary, the Court of Appeals or the Supreme Court for a stay of the injunction until the Supreme Court has had a chance to rule.

To: MARK VECIES
FROM: RANDY PURVIS



Dear Mr. Lott:

Thank you for your letter of April 23 to Secretary Regan concerning litigation on the issue of tax exempt status of private schools with discriminatory enrollment practices. As I am sure you are aware, the Treasury Department cannot comment on the merits of open litigation. We do however, appreciate being informed of your views on this matter.

Sincerely,

John E. Chapoton
Assistant Secretary
(Tax Policy)

The Honorable
Trent Lott
House of Representatives
Washington, D. C. 20515

TREASURY DOCUMENT PROFILE

DOC MO	DOC DA	RECEIVED MO	RECEIVED DA	RECEIVED YR	ACTION	LOG NUMBER
4	23	4	27	81	TAX POLICY	81-№ 6246

SOURCE/DESCRIPTION

TO:
- ☐ PRESIDENT
- ☒ SECRETARY (S)
- ☐ D/SECRETARY (D)
- ☐ U/SEC. (MA) (M)
- ☐ OTHER (*Specify*)

FROM: Lott, Trent (Cong.)

[handwritten: D Bste 520 / O Helen]

REFS:

CLASSIFICATION
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SUBJECT: Tax exempt status of all private schools in Mississippi

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7. ECONOMIC POLICY (E)			GOVT FIN OPERATIONS			EXEC SEC (SE)		
8. ENFORCEMENT & OPS (O)			IRS			D/EXEC SEC (SE)		
9. FISCAL (F)						REVIEWERS (SE)		
10. GENERAL COUNSEL (G)		XX	LEGISLATIVE COUNSEL (GL)			INTELLIGENCE SUPPORT (SEI)		
11. INTERNAT'L AFFAIRS (I)			MINT					
12. OASIA SECRETARIAT			PUBLIC DEBT			Mrs. Hardy		xx
13. LEGISLATIVE AFFAIRS (L) (Ack)		xx	REVENUE SHARING (HR)			READ FILE		
14. PUBLIC AFFAIRS (P) [handwritten: done 5/1]			SECRET SERVICE					
15. CORRESPONDENCE			SAVINGS BONDS					
16. TAX POLICY (X)	XX							
17. TREASURER (T)			DISCLOSURE BRANCH (AAL)					

ACTION REQUIRED

DUE DATE 5/4/81

☐ APPROPRIATE ACTION ☐ DIRECT REPLY ☒ COME BACK COPY TO EXEC SEC (SE)

MEMO TO:

REPLY FOR SIG. BY: Asst. Secy (L)

COMMENTS/SPECIAL INSTRUCTIONS

Please note due date and log number on comeback copy. If due date cannot be met, please advise Exec. Sec. on 566-2398.

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CONGRESSIONAL MAIL

PLEASE EXPEDITE

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[illegible]

April 23, 1981

The Honorable Donald T. Regan
Secretary
United States Department of Treasury
15th and Pennsylvania Avenue, NW
Washington, D.C. 20220

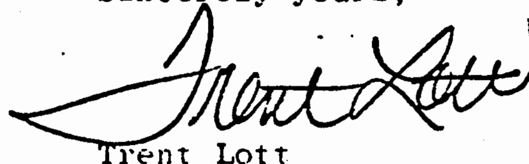
Dear Mr. Secretary:

From our earlier correspondence, you are thoroughly familiar with the circumstances in the Green case, wherein the Internal Revenue Service has been ordered to review the tax exemptions of all private schools in Mississippi, but not in other states. You may not yet be aware that the Court of Appeals has affirmed the District Court's refusal to permit a church school from Jackson to intervene to protect its rights.

The Jackson school is preparing to petition the Supreme Court of the United States for certiorari, and I have taken the liberty of submitting to the Attorney General a detailed examination of the legal situation as it now exists. I enclose herewith a copy of that letter so that you may have a full understanding of my position. I will appreciate anything you can do to help fulfill this Administration's commitment to take the Internal Revenue Service out of social policy.

With kind regards, I am

Sincerely yours,



Trent Lott

TL/mbw

cc: Martin Anderson

TRENT LOTT
5TH DISTRICT, MISSISSIPPI

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The schools first became aware of the case when the IRS began enforcing the order. Schools from Jackson and Hattiesburg immediately moved to intervene, but their efforts were rebuffed. The Jackson case has now been affimed by the Court of Appeals, and it is reasonable to believe that the Hattiesburg case will suffer the same fate unless your Department takes an active hand.

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I apologize for the unavoidable length of this letter. Commissioner Egger has told me that he wants to see this issue finally resolved by the Supreme Court, but his lawyers have so far been unable to tell him how to do it. The scandalous conduct of his predecessors has left the case in a procedural quagmire, and I am obliged to do everything in my power to help him out of it.

My own concern, of course, is twofold. I am disturbed that the courts and the previous Administration have ignored the clearly expressed will of Congress, and I am outraged that only my home state of Mississippi has been singled out for this treatment. I am confident that the Reagan Administration will take all steps necessary to join me in bringing this unfortunate episode to an appropriate resolution.

With kind regards, I am

Sincerely yours,

Trent Lott

TL/mbw

cc: Hon. Ronald Reagan
Hon. Donald Regan
Hon. Wade McCree
Hon. Roscoe Egger, Jr.
Hon. John Murray
Martin Anderson