

Internal Revenue vs. the Prophets

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American Protestantism, long something of a sacred cow in American life and politics, now finds itself seriously threatened by government on several fronts. The battle is shaping up over church tax exemptions, and the stakes, for both church and society, are breathtakingly high.

In July, 1969, the Communications Office of the United Church of Christ announced that it intended to testify before a Senate subcommittee on legislation regarding the renewal of television licenses. Two weeks later the good churchmen received notice from the Internal Revenue Service that "substantial" efforts to influence legislation could "jeopardize" the church's tax exemption.

Shortly before the November, 1970, elections, and following the Kent State killings, the national Episcopal Church proposed that a portion of one Sunday's collection go to a student "voter education" project. The IRS advised, upon inquiry by the church's legal counsel, that the project might jeopardize the church's tax exemption. The presiding bishop cancelled plans for the collection. Trinity Episcopal Church in Melrose, Massachusetts, permitted anti-war draft counseling in its basement, whereupon a local IRS agent suggested that the counseling service might cost the church its tax exemption.

The National Council of Churches has for some time been undergoing an intermittent but intensive IRS examination of its records to determine, among other things, whether its activities are consistent with its tax-exempt status.

The Christian Echoes National Ministry, the "Christian Crusade" church of anti-Communist evangelist Billie James Hargis, lost its tax exemption in the late 1960's because IRS determined the church had engaged in substantial efforts to influence legisla-

tion and had both backed and opposed candidates for public office. The church took the Government to Federal District Court in Oklahoma, and in June, 1971, the court ruled in the church's favor, holding that the church efforts were a manifestation of its religious position and not subject to examination or evaluation by either court or government.

Both the California Migrant Ministry and the Florida Migrant Ministry, interdenominational field ministries which have strongly supported Cesar Chavez's United Farm Workers, have been subjected to recent IRS inquiries about their continued right to tax exemption.

In January, 1972, a settlement house owned and operated by a Protestant mission board heard from the Government following an IRS investigation:

. . . [W]e noted that, in the past, you have conducted seven activities which are objectionable to the status of an organization exempt under section 501 (c) (3) of the Internal Revenue Code of 1954. These activities are:

1. Your facilities were used to plan a demonstration.
2. Your vehicle was used to transport pickets to a demonstration.
3. Your vehicle was used to transport several of your employees to a convention in Denver, Colorado. There is no evidence in your records to show that the purpose of the trip constituted an exempt activity.
4. Your facilities were used by the Mexican American Political Association.
5. You were associated with the Congress of Mexican American Unity. The Mexican American Association has as one of its purposes the selection and endorsement of political candidates.
6. During the years under examination, you adopted a general program of "community involvement" without notifying the District Director of Internal Revenue of the change in your operations.
7. Records were not maintained to show that activities of your executive director and community organizers were in furtherance of your exempt purpose.

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All of these activities are specifically prohibited by Section 501(c)(3) of the Code and the regulations thereunder.

Your exempt status may be adversely affected in future periods if you continue to perform any of the prohibited acts mentioned above.

These are a few of the incidents causing churches to view with new interest that distinguished group of organizations which have lost tax-exempt status because of social or political activism. A leading member of the group is the Sierra Club, a conservation group that has lobbied extensively for changes in state and federal law. Others are the Protestant journals *Christian Century* and *Christianity and Crisis*, both guilty of editorially supporting Lyndon Johnson in the 1964 election. The Fellowship of Reconciliation recovered its exemption after a law suit, while Americans United for Separation of Church and State is still suing to have its exemption restored.

Full federal tax exemption is available to churches and other religious organizations, to charities, educational organizations and to a few other specialized groups. In general it means that such organizations pay no income taxes on their earnings and that contributions to the organization are deductible by the donors in computing their own income taxes—a substantial incentive to giving. Federal statutes impose two conditions on the continued right to exemption: An exempt organization cannot, to any degree, participate in the election of a candidate to political office and

no substantial part of the activities of [the exempt organization] is carrying on propaganda, or otherwise attempting, to influence legislation. . . .

Does the law prohibit the Roman Catholic Church, for example, from lobbying against New York's recent abortion law? The restriction was born in charming legislative ambiguity, but IRS has parlayed the statutory language into a fabric of restrictions which would clearly bar such "grass roots" lobbying if it is "substantial." The statute does not define "substantial." Lawyers have often claimed it means five per cent of the activities or funds of the exempt organization, but such percentile thinking has been repudiated by IRS and criticized by the courts. Five per cent of the annual expenditures of any of the larger national church bodies would be an enormous figure. The Diocese of New York, for example, which is perhaps the most politically active of Episcopal dioceses, estimates that not over one per cent of its budget goes into lobbying activities.

The restriction on lobbying was added to the Internal Revenue Code in 1934 as part of a package aimed at plugging loopholes. In debate on the bill, committee members reported to the Senate that the

amendment was intended to apply where contributors gave money *in order* to have the exempt organization influence particular legislation favorable to the contributor. Senator James A. Reed plaintively told the Senate:

That is what the committee were trying to reach; but we found great difficulty in phrasing the amendment. I do not reproach the draftsmen. I think we gave them an impossible task; but this amendment goes much further than the committee intended to go.

The committee wanted to use "motive" as the measure for applying the amendment, but "motive" is a difficult, if not impossible, factor to describe in usable legislative language. Senator Reed expressed the forlorn hope that the unsuccessful language would be corrected prior to a House-Senate conference.

Mr. President, I do not think the committee is proud of the language in which this amendment is couched. I know that the legislative drafting counsel who drew it expressed no pride whatever in their product; but . . . if the amendment is agreed to we will have from now until the conference to study the subject and prepare better phraseology.

However, the restriction became law without further change and has been the basis for extensive Treasury Department regulations purporting to carry out the manifest intent of Congress.

Today's instances of loss, or threatened loss, of tax exemption derive from that remarkably uncertain intent. Does the language cover churches? Not a word in the Congressional debates suggests that this was intended, but the language is broad enough to cover all fully exempt organizations, including churches.

Treasury regulations define attempts to influence legislation as any activity that

Contacts, or urges the public to contact, members of a legislative body for the purpose of proposing, supporting or opposing legislation; or
Advocates the adoption or rejection of legislation.

As we shall see, the statutory and regulatory language would severely inhibit the historical role of the churches in American society.

The recent actions of the IRS are only one sign of a growing and major confrontation between government and church. The church has become sufficiently dependent upon governmental favor that it is vulnerable on many fronts. For example, the Internal Revenue Code allows a minister to exclude from taxable income what is paid him as an allowance to cover the cost of housing. That allowance can amount to as much as a third of a minister's income and is thus a significant tax benefit. "Minister" includes for these purposes a clergy-

man who works in a large office building running a national denomination's newsletter and whose principal professional accoutrements are typewriters, a xerox machine and a conference room. Revenue agents have suggested to this writer that the right of the clergy to a housing allowance should depend on their "sacerdotal" or "priestly" function and that administering a church-related office may not qualify.

Another example. Unknown to the Unitarian-Universalist Association—the national organization of the Unitarian Church—its bank records, covering the period June 1 through October 15, 1971, were subpoenaed from a bank in Boston. These records, which the bank turned over without informing the church, were then examined by the FBI in connection with a Boston Federal Grand Jury investigation of the publication by Beacon Press (the Unitarian-Universalist Association publishing house) of the Pentagon Papers as released by Senator Mike Gravel. Alerted by this incident, some national churches are now discussing formal agreements whereby the banks will inform the churches before turning over records in response to government demands so that the churches may take suitable legal action.

At the other end of the political spectrum, Bob Jones University of Greenville, South Carolina, a conservative Bible college, is tax exempt as an educational institution. Bob Jones has a white student body, avowedly based on its claim that the Bible ordains separation of the races. A recent tax ruling bars exemption to any educational organization that discriminates on the basis of race. In 1971, Internal Revenue advised Bob Jones University of its intention to revoke its exemption unless it met federal nondiscrimination requirements. The University went into the Federal District Court in Greenville and obtained a restraining order barring the revocation of exemption, contending that its racial admission policy was an expression of its religious doctrine and not subject to governmental regulation. The Government has appealed.

There is also a curious movement to "congregationalize," or localize, national churches. In occasional decisions, courts have generally upheld the right of a national church—such as the United Presbyterian Church in the United States—to control the real estate of its local congregations. The courts have usually enforced the decision of the highest church tribunal to which a dispute on land or buildings has been carried. But in a suit between the national Presbyterian Church and a Savannah, Georgia, congregation, the Mary E. B. Hull Memorial Presbyterian Church, the local church demanded control of its property on the ground that the national church had so "departed from doctrine" (by civil rights activism, by ordaining women, by participating in the National Council of Churches, by

taking various positions on public issues) that it had lost the benefit of an implied trust of local church property and the property should therefore revert to the local congregation. The Savannah trial with, we understand, a predominantly Baptist jury, found, as was expected, that the national church had departed from church doctrine. On appeal, the United States Supreme Court held that the trial court had no business ruling on ecclesiastical doctrine, since such a determination would compel a violation of the separation of Church and State. The case was sent back for further proceedings and the trial judge then ruled that, since he could not consider "departure from doctrine," he was forced to ignore the so-called implied trust that favored the national church; he gave control of the property to the body named on the deed, the local church.

Some other local churches are seeking withdrawal from their ecclesiastical parents, and their vehicle too will be court rulings on the right to the use of real estate.

The foregoing illustrates the intricate involvement of the church with property, with law, with government, with taxation and with the courts. Our vaunted "separation of Church and State" does not describe a factual relationship but reflects a wishful notion of religious independence based in part on a mythologizing of the history of the American church. Involvement means vulnerability to adverse changes in the relationship. As the church has come into conflict with the Government on major policy questions, it is not surprising that the Government has aimed at the churches' exposed Achilles' heel—their dependence on tax benefits.

This is the *new* separation of Church and State: a relationship not of independent potentates with authority over their respective domains but one in which the church must be another countervailing power contributing to the public consensus. In this relationship the church cannot watch with passive surprise as its voice is gradually muffled by the State.

American Protestantism is ill prepared for its new role. Since pre-Colonial times it has built comfortable ecclesiastical empires with temporal accommodations achieved through its privileged social and legal position. Far from being separate from the State, the early Colonial church functioned as an important part of the governmental establishment. The church was responsible for the care of the poor, ill and insane in the pre-Jacksonian days before our institutionalized systems of care. Early public "poor" records were often the reports of local church-wardens. Early Protestant churches were active in the pre-Revolutionary independence movement, as, indeed, they have been leading participants in most of the major social issues, including the anti-slavery movement, public education, the temperance movement, birth control, abortion reform, divorce reform, the

anti-Vietnam war movement and civil rights. It is in light of this history that one recognizes the enormity of the change threatened by recent IRS activities.

For 250 years the role of the churches in American society has depended upon favorable tax laws. Church land and buildings survived because, in significant part, they were exempt from real estate taxation. One of the oldest, if not the oldest, surviving corporations in the United States is "The Minister, Elders and Deacons of the Reformed Protestant Dutch Church of the City of New York" (the corporate entity of the Dutch Reformed Church in New York City), which enjoys a calfskin charter granted by King William III in 1696. Over 276 years the corporation has been given numerous parcels of land in the City's rich financial district, the income from which is crucial to the church's work. Trinity Episcopal Parish, centered at the corner of Wall Street and Broadway and chartered by the Crown in 1697, has a similar, if not more successful, financial history. Churches have been able to retain a good deal of their property because it was not nibbled away by government taxes. Exemption from income tax and the deductibility of contributions have—in the face of rising income, rising taxes and rising costs—contributed significantly to the present relatively comfortable position of the major American churches.

The established churches have developed national offices guided by sophisticated administrators familiar with economic and political realities and transcending, in some measure, regional differences. The National Council of Churches of Christ, *the* national association of Protestant churches, speaks for most Protestant churches with, often, one voice. Together with the national hierarchy of the Roman Catholic Church and the Synagogue Council of America, it provides a national voice for American religion and is a powerful mechanism for influencing public opinion. I believe that these bodies and their constituent religious groups rightfully carry on the historical task of the church to influence public thought on issues of great moment.

Why, at this point in American history, is the Government attempting to inhibit the social witness of religion? *First*, because through national administrative structures the church is able to speak with a single national voice or at least several strong national voices. *Second*, national church bodies have become more sophisticated in the use of power. Many national churches, as well as the National Council of Churches, maintain Washington offices with legislative liaison employees. Church representatives often know personally the principal members of relevant Congressional committees and are able to relay to their national administrations instant information on significant Congressional actions. At the state level, too, many

churches are increasingly effective. The Episcopal Diocese of New York reports that various of its agencies took formal positions in 1968 for or against the following New York State legislation: therapeutic abortion; migrant workers; wiretapping and eavesdropping; New York City rent control; Medicaid; religious preference in adoptions; narcotic addiction; state labor law; unemployment insurance; jurisdiction over adoptions; amnesty for first offenders; inquiry by employers into arrest records; neighborhood schools; public housing funds; public housing tenancy; off-track betting; prison work-release programs; arrests for civil rights activity; state aid to public schools; deviate sexual behavior; minimum drinking age; and abolition of capital punishment.

The *third* probable reason for IRS behavior now is that the church has openly opposed Government policy, especially on the war in Vietnam but also on civil rights matters. In March, 1972, the National Council of Churches convened a "Conference of Ecumenical Witness" in Kansas City, attended by representatives of the three major religious groupings. As described by Robert S. Bilheimer, executive director of the Department of International Affairs of the NCC, the Ecumenical Witness

mounted a frontal attack upon the veracity of the Administration concerning Indochina, issued a call to make the war *the* primary election issue, supported those who refuse to fight and pay war taxes, made repeated references to "peace and justice candidates" for political office, and, especially, outlined a program for the use of the economic power of church and synagogue to combat militarism and racism and to help secure justice and peace ["No Violin, But Not Yet a Trumpet," *America*, February 5, 1972].

This is but one manifestation of the church's duty to be "prophetic," that is, to influence public thought on matters of importance to the church. The Methodist Church put it this way in 1964:

Inescapably the interests of the church as a corporate body are affected by the public policies of the government. Like other social groups, the church has a right to speak or act corporately on those matters of public policy which are of vital concern to its interests, its ministry, and its witness in the world. Any conception of church-government relations which denies the church this right strikes at the very core of religious liberty ["Relations Between Church and Government," Report by the Study Commission on Church and State Relations to the General Conference of the Methodist Church, February, 1964].

And the Presbyterians in 1963:

How then should the church bear witness to its Lord in our present time? . . . The question as to *whether* the church should proclaim its gospel is unthinkable! Likewise unthinkable is the possibility that that proclamation can be limited in scope so as to leave the political and social realm undisturbed ["Relations Between Church and State in the United States

of America," 175th General Assembly, United Presbyterian Church, May, 1963].

Having been favored by government and populace for the past 250 years, the church is now naively astonished that government agencies dare to question its role. Too many churchmen believed that Jefferson's "wall of separation between Church and State" guaranteed that, even if the church became an effective countervailing political power, it would remain inviolate. Foolish churchmen. The countervailing power the church seeks and should have must be fought for and can be retained only by a ferocity that timid church administrations and their timid legal advisors have not shown to date.

The right of a church to tax-exempt status even when it influences public opinion on legislative matters is only one skirmish in a much larger engagement. As a matter of historical mission and relevance the church *must* be outspoken. And it must be outspoken on matters of importance. Any statute that would limit the right of a church to be outspoken on matters of importance is, of course, a profoundly wicked statute.^o It must be changed. In

a time of instantaneous national communication through media, government rests to a greater and greater degree on the national collective opinion. The right of disparate voices to influence that opinion is as essential to civilized government as it is to the vitality and viability of the church itself. Politics and public welfare are increasingly intertwined, and a silenced church would be no more than a ceremonial remnant.

So far, the church has circulated excited messages within its sanctums about the "chilling effect" of IRS forays, but it has failed to join with others to change the law or even to challenge the inhibiting application of the present law. The church's continued false sense of security may mean that the church as an *independent* voice in this pluralistic society will soon be terminated.

^o The statutory restriction on the right of a church to influence public opinion on legislative matters as the price of tax exemption is also probably unconstitutional in my opinion. That is, however, another question and beyond the scope of this paper. The question should nevertheless be of interest to national church administration legal counsel, who, at least until quite recently, have shown notable timidity in suggesting challenges to the statute.