S. HRG. 98-709

SOCIAL SECURITY COVERAGE FOR EMPLOYEES OF RELIGIOUS ORGANIZATIONS

HEARING

BEFORE THE

COMMITTEE ON FINANCE
UNITED STATES SENATE

NINETY-EIGHTH CONGRESS

FIRST SESSION

ON

S. 2099

DECEMBER 14, 1983

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CONTENTS

PUBLIC WITNESSES

ADDITIONAL INFORMATION

COMMUNICATIONS

SOCIAL SECURITY COVERAGE FOR EMPLOYEES OF RELIGIOUS ORGANIZATIONS

WEDNESDAY, DECEMBER 14, 1983

U.S. SENATE,
COMMITTEE ON FINANCE,
Washington, D.C.

The committee met, pursuant to notice, at 2:07 p.m., in room SD-215, Dirksen Senate Office Building, the Honorable Robert Dole (chairman) presiding.

Present: Senator Dole.

[The press release announcing the hearing and the prepared statement of Senator Dole follows:]

[Press release No. 83-201]

SENATE FINANCE COMMITTEE SETS HEARING ON SOCIAL SECURITY COVERAGE FOR EMPLOYEES OF RELIGIOUS ORGANIZATIONS

Senator Robert J. Dole (R., Kans.), Chairman of the Senate Finance Committee, announced today that the Committee will hold a hearing on Wednesday, December 14, 1983, on the issue of mandatory social security coverage for employees of religious organizations.

The hearing will begin at 2:00 p.m. on December 14, 1983 in Room SD-215 of the Dirksen Senate Office Building.

In announcing the hearing, Senator Dole said "the provision in the Social Security Amendments of 1983 which extends mandatory coverage to the employees of nonprofit organizations has unfortunately created confusion among members of churches and other religious organizations. Although the social security tax would be levied on the earnings of covered employees, not on the church or religious organization, some concerns have nevertheless been raised about the constitutionality of this provision, which becomes effective January 1, 1984."

Previously, nonprofit organizations, whether religious, educational or charitable, were covered under social security on an optional basis. These organizations could elect to cover their employees—an option taken by the great majority of nonprofit organizations. Under the new law, coverage under social security will be mandatory. The treatment of ministers and members of religious orders, covered by social security since 1954, was not altered in any way.

"Certainly it was not our intention in Congress to violate the fundamental separation between church and state, as protected by the Constitution," Senator Dole continued. "Our purpose was to ensure social security protection for employees of nonprofit organizations the same as for all other private sector employees."

Senator Dole stated that the Committee will receive testimony on the issue of mandatory social security coverage for employees of religious organizations, and on S. 2099, introduced by Senator Roger W. Jepsen (R., Iowa), which would delay for 2 years the effective date of this provision.

STATEMENT BY SENATOR BOB DOLE ON SOCIAL SECURITY COVERAGE FOR EMPLOYEES OF RELIGIOUS ORGANIZATIONS

Good afternoon. I would like to welcome each of our witnesses to today's hearing on Social Security Coverage for Employees of Religious Organizations. The provision

included in the Social Security Amendments of 1983 which mandates coverage for the employees of nonprofit organizations has recently led to some confusion and concern among members of churches and religious organizations. In particular, concerns have been raised about the constitutionality of this provision, which we hope to hear and assess today.

Background on provision

By way of background, the expansion of social security coverage was recommended by the President's National Commission on Social Security Reform, of which I was a member. Previously, nonprofit organizations, whether religious, educational or charitable, were covered under social security on an optional basis. These organizations could elect to have their employees covered—an option taken by the great majority of nonprofit organizations. Under the new law, coverage under social security will be mandatory. The treatment of ministers and members of religious orders, covered by social security since 1954, was not altered in any way.

In addition to mandatory coverage of employees of all nonprofit organizations, the National Commission also recommended covering all newly hired Federal employees and closing off the option for State and local governments to opt out of the social security system. These recommendations were part of the consensus financing package announced in January, which had broad bipartisan support.

Public hearings by the National Commission were not held on specific proposals such as the coverage of nonprofit organizations. The financial condition of social security was critical and the time we had to complete our work was necessarily limited. Also, extensive hearings had already been held. The National Commission received the results of many hearings as well as the reports of other public bodies including the Congress, the 1979 Advisory Council on Social Security, and the 1981 National Commission on Social Security. Advice was sought from many experts and a wide variety of alternative proposals was examined by the National Commission.

The recommendations of the National Commission were, however, carefully considered in public hearings before this committee and the House Ways and Means Committee. We heard testimony on every aspect of the proposed legislation from a broad spectrum of witnesses. Objections of the sort we will hear today were not raised. I must say, these constitutional arguments were not discussed. For this reason, I particularly appreciate the testimony we will hear today.

As signed into law on April 20, the Social Security Amendments of 1983 included each of the National Commission's major recommendations. No one, myself included, supported each and every element of the consensus package. The important fact was that a bipartisan consensus was reached on how to save the retirement system. Both the short- and long-range deficit identified by the National Commission were eliminated by the legislation. Accomplishing this required concessions from everyone with a stake in social security—current and future beneficiaries, worker-taxpayers, and people who did not previously contribute to the system.

The goal of mandatory coverage

Certainly, in extending social security coverage to employees of religious organizations, it was not our intention to violate the fundamental separation between church and State, as protected by the Constitution. Our purpose was to ensure social security protection for employees of nonprofit organizations the same as for all other private sector employees.

There were two problems we in the National Commission and in Congress were attempting to address by this provision. First of all, while a large proportion of nonprofits had opted to be covered by social security—80–85 percent, I am advised—we were beginning to observe a noticeable increase in the number of organizations withdrawing from the system. Employees in organizations which withdrew had no direct say in this decision. Short of changing jobs and reentering covered employment, their protection under social security was being eroded or eliminated.

It was our judgment that social security coverage is beneficial for employees of nonprofit organizations. Those not covered by social security frequently do not have "portable" pension rights; frequently they have no disability protection. In addition, because the empoyees of nonprofit organizations are often low paid, social security tends to offer a proportionately high return on contributions.

Another problem we hoped to deal with were "windfalls." Because of the relatively high return offered people with low average earnings, windfalls were being reaped by people who moved between covered and noncovered employment and who thus had only brief periods of covered employment. The broad application of the social security system would eliminate these windfalls and allow benefits to be properly distributed relative to actual earnings and contributions. There may have been

other ways to accomplish these goals, however, and we will give this serious consideration.

Recent concerns

Since the enactment of this legislation, concerns have been expressed about extending mandatory social security coverage to employees of religious organizations. Some have argued that this provision violates the fundamental separation between church and State. Others have argued that social security coverage violates their fundamental religious beliefs. The purpose of this hearing is to allow representatives of religious organizations to voice their concerns and to allow the committee an opportunity to evaluate these concerns.

Senator Jepsen has introduced S. 2099 which would delay mandatory coverage of employees of religious organizations until 1986. If there are problems with the social security coverage provisions, this would provide Congress with the necessary time to address them in a way that is consistent with the goals and objectives of the National Commission.

I respect the sincere religious and constitutional concerns that many persons have raised with respect to mandatory social security coverage of employees of religious organizations. I am hopeful that these hearings might suggest some solution to the complex problems that mandatory coverage poses.

Perhaps one solution that will equitably accomplish all objectives would be to make social security coverage of religious organizations optional with the organizations, but treat employees of nonelecting religious organizations as self-employed persons for purposes of social security taxes. This will prevent any church or religious organization from being forced to pay social security taxes. On the other hand, this option would seem to provide nearly the same level of revenue and coverage for the social security system.

I appreciate your taking the time to prepare testimony on this important provision and I look forward to hearing your testimony.

The CHAIRMAN. Let me first welcome the witnesses at this afternoon's hearing on coverage for employees of religious organizations under social security.

I have a statement, but I will refer to that later. I apologize for being just a few moments late.

I would hope that the witnesses can summarize their statements, and then we may have some questions.

We would like to start off first with our distinguished colleague from Missouri, Senator Tom Eagleton.

Tom, I am happy to have you here.

STATEMENT OF THE HONORABLE THOMAS F. EAGLETON, U.S. SENATOR FROM THE STATE OF MISSOURI

Senator EAGLETON. Thank you very much, Mr. Chairman. I ask unanimous consent that a full, detailed statement appear in the record as though read. And I also ask unanimous consent that a statement by Congressman George Hanson appear in the record at an appropriate point.

The CHAIRMAN. Right. And this would be a good point to put in a statement by Senator Roger Jepsen, at this point in the record.

Senator EAGLETON. Very good.

[The prepared statements of Senator Eagleton, Congressman George Hanson, and Senator Roger Jepsen follow:]

STATEMENT OF SENATOR THOMAS F. EAGLETON

before the

SENATE COMMITTEE ON FINANCE

December 14, 1983
2:00 p.m.

I appreciate the opportunity to appear before you today concerning the constitutionality of Congress requiring religious organizations including churches, and their employees, to participate in the social security system. When Congress so voted last March, it broke with the Social Security Act's historic tradition since 1935 of rejecting mandatory coverage of these organizations.

Mandating participation of religious organizations in our tax system, I believe, violates the constitutional principle of religious liberty required by the First Amendment and as embodied in more than 100 years of Supreme Court jurisprudence. Should Congress fail to amend the social security package, I fear that the provision about which we speak will fall prey to constitutional attack. Senator Jepsen has introduced legislation, which I support, providing a two-year delay in implementation of the 1983 Amendments as applied to religious institutions, to allow Congress the time it needs to explore the legal and policy ramifications.

This afternoon I would like to briefly outline the constitutional argument as I see it.

THE CONSTITUTIONAL STANDARD

The Supreme Court interpretation of the First Amendment, beginning with its first important religious liberty case in 1878,[1/] has shown great sensitivity to the tension between religion and government. In the 1963 landmark case of Sherbert v. Verner, the Court applied a "balancing of the interests" test in resolving this tension. For the first time, the Court affirmed a duty to weigh the damage to an individual's freedom of conscience against the harm to the government's legislative scheme. Writing for the majority, Mr. Justice Brennan stated that "[i]t is basic that no showing merely of a rational relationship to some colorable state interest would suffice; in this highly sensitive constitutional area, '[o]nly the gravest abuses, endangering paramount interests give occasion for permissible limitations....'."

Sherbert was also significant because it placed on government the burden of coming forward to show how a religious exemption would interfere with purposes of a regulatory program, and crystallized the doctrine that there is a "zone of required accommodation" (as Professor Tribe has said) in which the state must use religious classifications to prevent direct or indirect burdens on religion unless there is an overriding state interest to the contrary.

1/ Reynolds v. U.S., 98 U.S. 145 (1878).

Obviously, in applying this "interest balancing" test, some religious exemptions have been held to endanger the effective implementation of government programs. For this reason, religiously grounded conduct is not always within the protection of the free exercise clause. Activities, though religiously motivated, can be subject to regulation. (E.g., Sunday closing laws in Braunfeld v. Brown, compulsory vaccinations in Jacobson v. Massachusetts, child labor laws in Prince v. Massachusetts, and general taxation in U.S. v. American Friends Service Comm..)

Agreement that religiously based conduct must often be subject to the broad powers of government does not deny that there are certain activities protected by the free exercise clause and thus beyond the control of government, even under regulations of general applicability. (E.g., mandatory flag salute in West Va. State Bd. of Education v. Barnette, the draft in U.S. v. Seeger, compulsory school attendance in Wisconsin v. Yoder, jury duty in In re Jenison, and unemployment compensation laws in Sherbert v. Verner and Thomas v. Review Board.)

Particularly when the church itself, and not merely a member, is affected by a government activity, the Supreme Court has been most sensitive to First Amendment considerations and extremely loathe to balance the competing interests in favor of the government. This is so, in order to maintain "a wall of separation between Church and State."[1/] This is the heart of the issue before us today.

1/ Everson v. Board of Education, 330 U.S. 1, 18 (1947)

CHURCH-STATE SEPARATION

Certainly, in all of the Supreme Court cases pertaining to church taxation of which I am aware, the Court has rejected church taxation on the theory that it keeps the government and the church far apart from each other, recognizing that neither should involve itself with the work of the other.

Walz v. Tax Commission, a premier 1969 Supreme Court case on church real property tax exemption, underscored this principle when the Court said "[t]he exemption creates only a minimal and remote involvement between church and state, far less than taxation of churches. It restricts the fiscal relationship between them, tending to complement and reinforce the desired separation insulating each from the other."

There are two other highly pertinent cases confirming the Supreme Court's acute appreciation of church-state separation.

In NLRB v. Catholic Bishop of Chicago, decided in 1978, the Supreme Court held the NLRB did not have jurisdiction over lay faculty members of two groups of Catholic high schools and could not require the schools to bargain with unions representing lay teachers. While the majority declined to reach the First Amendment issue, it saw "no escape from conflicts flowing from the Board's exercise of jurisdiction over teachers in church-operated schools and the consequent serious First Amendment questions that would follow."

The 1980 case of St. Martin Evangelical Lutheran Church v. South Dakota concerned whether employees of church-affiliated schools were exempt from unemployment compensation taxes imposed by the Federal Unemployment Tax Act (FUTA). The Supreme Court reviewed the Act's original legislative history, and despite "indefinite congressional expressions" to the contrary in more recent legislative history, held that the Act must be read to exempt such schools from coverage. In so holding, the Court deliberately avoided ruling on whether the First Amendment would require such schools to be exempt. Nonetheless, in upholding the exemption to avoid "raising doubts" about FUTA's constitutionality, the Court implied FUTA is on stronger constitutional ground if it does maintain the church-state separation.

To support the argument of universal coverage, some of my colleagues might look to the 1982 Supreme Court case of U.S. v. Lee, where an individual of the Amish faith was required to participate in the social security program despite his religious liberty claim for exemption. I hasten to point out that the case focused only on government taxation of an individual parishioner, not of the church itself. As the above cases indicate, there is a vast difference between the two. In the latter instance, there is a far more significant threat of government entanglement, and the claim for religious exemption is much more heavily weighed.

BALANCING THE INTERESTS

It has been said that "[j]udicial inclination to be more explicit in assessing the government interest than in evaluating the competing religious claim suggests that the critical element in a religious liberty case is assessment of the government interest."[1/] Let us turn to such an assessment.

The government's conceivable interests include cost, uniformity, and the possibility that a religious exemption may cause harm to others, strip classes of people of a secure retirement, or grant a benefit to religion. In none of these areas can government make a persuasive case. Let me explain why.

1. Cost: Although the House Report on the 1983 Amendments referred to the "growing trend" toward termination of coverage for non-profit organizations generally, and singled-out hospitals in particular, it made no special mention of religious organizations. About 80-90 percent of the employees of non-profit organizations participate. Figures on religious institutions alone are difficult to find, but I think we can assume their participation is higher, for I know that a full 90 percent of the employees of Catholic organizations have participated.

1/ Giannella, Religious Liberty, Nonestablishment and Doctrinal Development, 80 Harv. L. Rev. 1381, 1390 (1967).

2. Uniformity: The 1983 Amendments sought "uniform coverage." Indeed, the Supreme Court in Lee referred to a 1965 Senate Report which said: "widespread individual voluntary coverage under social security... would undermine the soundness of the social security program." (emphasis added) This legitimate concern is not at all undercut by the exemption I advocate: I refer to an exemption claimed by organizations, not by individuals. Administrative problems and the extent of withdrawal would be minimized if the decision lies with the organization, as opposed to the individual. Moreover, since we assume that most of the organizations about which we are concerned will choose to voluntarily participate, the desired exemption allows us to uphold a vital constitutional principle with no cost of disruption.

3. Harm: Plainly, an exemption would not undermine the central purpose of the Act, which is to broadly provide to the nation's citizens economic security in retirement. Citizen appreciation of and protection under the social security program is not at all dependent on whether every single person is covered.

4. Favoritism: There would be no special bonus conferred to churches because where employees do not pay into the system, they do not receive its benefits.

5. An unprotected class: Very few of our citizens will in fact go unprotected with this exemption, because, as I have said, the vast majority of religious institutions will opt in. It is safe to assume that the small percentage of employees left without social security coverage can obtain alternative coverage under private insurance plans.

Given the consistent social security history against mandated coverage for religious institutions, and the weak government justifications for a policy change, I fail to see anything more than a "negligible" (certainly not "compelling") government interest in its position, especially if weighed against a potent First Amendment interest. Let us turn to that.

The church's interest which is at stake over this optional exemption is simply this: freedom from government interference. The tax system inevitably involves the government in the operations and finances of the enterprises it oversees and investigates. Financial records, employee data and other materials will become fair game for government scrutiny. Walz was decided precisely on this basis. The Supreme Court was concerned particularly with the "conflicts that follow in the train of those legal processes."

CONSIDERATIONS BEYOND CONSTITUTIONAL ONES

Despite my strong belief in the constitutional infirmity of mandating participation, there is no real way to firmly predict the constitutionality of our action, for in First Amendment cases such as these, the Supreme Court "interest balancing" approach is inevitably somewhat ad hoc. However, considerations beyond constitutional ones -- those of policy and practicality -- also dictate strong separation of church and state. The government's coffers would not be measurably filled by mandatory coverage; the "optional" system has served us well with no administrative or participation problems; and there would be no disruption of the social security system. I feel confident that the two-year study recommended by Senator Jepsen will reach similar conclusions.

Some of my colleagues may feel reluctant to reopen the carefully crafted 1983 Amendments for fear that it will encourage a floodgate of modifications. While I do not expect that will happen, my own view is that if the reasons for such action are compelling, as they are here, we ought to entertain narrow reconsiderations. Some of us here today have already supported one such reopening of the 1983 Amendments, regarding a two-year delay of social security coverage of retired federal judges on active duty. On September 29, we adopted the two-year delay to evaluate the impact of that measure. More recently, Senator Dole, you and Congressman Rostenkowski circulated a letter indicating that the package should be amended in yet

another area -- coverage of Congressional employees. The Chairman's own willingness to re-open the package certainly reinforces the point that a massive piece of legislation, hastily adopted in the heat of compromise, should not be forever viewed as sacrosanct, especially where serious problems stand uncorrected.

CONCLUSION

While the literal views of the Framers do not settle every question of constitutional interpretation -- especially in an area like the First Amendment which evolves as society and its needs change -- they do help us to ascertain the original purposes of the Religion Clauses. James Madison, deemed most responsible for the adoption of the First Amendment, made much of the "religious conscience" of America, stating that: "The Religion then of every man must be left to the conviction and conscience of every man[1/]... No State shall violate the equal rights of conscience..."[2/] The Supreme Court case of McCollum v. Board of Education[3/] perhaps best incorporated Madison's view of the purpose of separation of church and state: "[T]he First Amendment rests on the premise that both religion and government can best work to achieve their lofty aims if each is left free from the other within its respective sphere."

Thank you for allowing me to present my views. I urge this panel to endorse the Jepsen legislation, providing time for further study in order to save ourselves from later constitutional challenge.

1/ 2 Writings of James Madison 183-91 (1901).
2/ 1 Annals of Cong. 434-35 (1834).
3/ 333 U.S. 203, 212 (1948).

NEWS

Congressman George Hansen
2nd District, Idaho

1125 LONGWORTH HOUSE OFFICE BUILDING, WASHINGTON, D.C. 20515 • TELE: 202—225-5531

REPEAL INCLUSION OF RELIGIOUS WORKERS IN SOCIAL SECURITY SYSTEM

STATEMENT BY CONGRESSMAN GEORGE HANSEN

During the past several years, I have become increasingly concerned over the constant growth of federal, state and local government involvement with matters of religion, and indeed with the very fabric of religious organizations themselves. At the close of 1981, in the catchall tax bill which came to be known as TEFRA, yet another step was taken to further involve the Federal Government with the management of churches.

In pasing into law a provision thrusting church workers involuntarily into the Social Security system, little or no thought was given to the consequences of such a provision on the freedom of religion guaranteed to religions by the free exercise clause of the First Amendment to the United States Constitution.

The Congress has again, as it now so often does, elected to take a course of action inimical to the deeper interests of the nation in having its religious groups free of government supervision. What thought has been given to the enforcement and collection practices of the Internal Revenue Service as they affect the churches now compelled to participate in Social Security? IRS has, for many years, been accused by many churches of overt hostility to religion. Will the paltry sums to be realized from compelling contribution by church employees be worth the new frictions bound to result from the insensitivity of this now notorious agency.

More important still, this ill-considered inclusion is set against the already deep involvement of the federal government in religions. We now have a federal agency which qualifies religions, declaring them to be legitimate or not, as it determines the effect of its regulatory yardsticks. I believe that our insatiable lust for revenue has led us to the point where, given a choice between defending the First Amendment guaranteed Freedom of Religion and finding sources of that revenue, we have become blinded to the full implication of going to war with the very groups which form the character of the nation.

I strongly urge the Senate Finance Committee to reconsider its inclusion of involuntary church workers under Social Security and pass the sort of repealer urged by Senator Roger Jepsen, which I both sponsor and endorse and will work for on the House side.

# # #

STATEMENT OF

SENATOR ROGER W. JEPSEN (R-IOWA)

IN SUPPORT OF S. 2099

BEFORE THE UNITED STATES SENATE FINANCE COMMITTEE

DECEMBER 14, 1983

Mr. Chairman and Members of the Committee:

I am delighted to have this opportunity to share my views with the Finance Committee on S. 2099.

This bill which I introduced last month would provide a two-year delay of the mandatory taxation of religious organizations and their employees under Social Security. Since its introduction, I have been joined in this effort by twelve of my colleagues: Senators Nickles, Armstrong, McClure, Helms, Abdnor, East, Trible, Boren, Symms, Murkowski, Johnston, and Tower.

Due to a prior scheduling commitment in Iowa, I am unable to be with you today. I want to express my appreciation to Senator Dole for so graciously agreeing to hear the views that will be presented today.

I am pleased with the expertise of the witnesses the Finance Committee selected to testify on this issue.

Among them are: constitutional lawyers, pastors, representatives of religious organizations whose members are directly affected by the new law, and my friend, Bob Myers, who was Executive Director of the National Commission on Social Security Reform.

I am particularly pleased that Pastor Olen Adams of Quint City Baptist Temple who brought this matter to my attention is there from Davenport, Iowa.

S. 2099

I address the Committee as a member of the United States Senate, sworn to uphold the Constitution of the United States. It is my firm conviction that the Congress has inadvertently failed to address a serious First Amendment issue involving the taxation of churches.

Section 102 of the Social Security Amendments of 1983 requires the mandatory Social Security taxation of all tax-exempt non-profit organizations defined by Section 501 (c)(3) of the Internal Revenue Code beginning January 1, 1984, which includes religious, charitable, and educational organizations.

The Social Security hearings conducted by the Finance Committee and the Subcommittee on Social Security did not specifically or fully consider the constitutional ramifications of the mandatory taxation of churches under Social Security.

For the first time in America's history, money freely given to churches and other religious organizations for the purpose of promoting religious activity will be used to pay taxes on a mandatory basis.

Although there are economic consequences to all tax-exempt non-profit organizations due to this new law, those consequences were considered in hearings prior to enactment of the 1983 law (P.L. 98-21). The arguments made at that time were not sufficient for the Congress to continue the voluntary coverage system established in 1950. That decision is not in question and is not addressed by S. 2099.

At this hearing, witnesses will address the constitutional issue of taxing churches. Others will address the theological issue of the

right of the federal government to demand part of a church's treasury for the payment of a tax. I will address the merits of S. 2099, the two-year delay of the mandatory taxation of religious organizations and their employees under Social Security.

It is important to clarify the terminology involved in this discussion. The concern of church leaders with whom I have spoken is the government's right to levy a tax on the church income that is expressly given to the church to be used for religious activities. They do not object to paying the Social Security tax because Social Security is a government-sponsored insurance program. They object because paying the Social Security tax is paying a tax, possibly the first of many taxes.

The Supreme Court has ruled on several occasions that Social Security is a tax. Thus, the question before us is: Should the government begin taxing churches? Under previous law, churches were exempt from taxation of all types. Many religious organizations currently participate in Social Security on a voluntary basis. In that situation, leaders of individual churches choose whether or not to pay the necessary taxes in order to participate. The new law requires payment of the tax, thus taking away the right of the church leaders to determine the use of the funds placed in their care by church donors.

The two year delay that I am proposing would allow a specific time period during which Congress could examine the consequences of taxing churches. If Congress does not act, the mandatory coverage provision will go into effect.

This issue is one of grave concern to many church leaders and church members. At the very least, there should be extensive hearings on the options available to Congress. An issue that has been decided time and time again on the side of exempting churches due to Constitutional safeguards embodied in the Bill of Rights deserves extensive consideration. This hearing is an important first step.

S. 2099 AND THE SOCIAL SECURITY REFORM PACKAGE

The Social Security reform package should be preserved. I may not have agreed with every provision, but I support the National Commission and the congressional committees that worked so hard to put the program on a sound financial footing.

I believe that passage of S. 2099 is a reasonable, sound and prudent step that Congress should take and that it does not jeopardize the reform package.

The objection raised regarding S. 2099 is that if one portion of the package is removed, the entire package will crumble. I am not proposing that we remove a provision, but rather that we repair one.

Although it was generally agreed that the Social Security system was in need of financial reform, the package developed by the National Commission on Social Security Reform was examined for only two months prior to passage of the compromise bill in both Houses. It is reasonable to assume that the ramifications of every single provision might not have been realized and subsequently examined.

Clearly the overwhelming consideration for almost all of the provisions was revenue gain not constitutional consequences.

The case of retired federal judges is analogous to the case of the taxation of churches. Therefore, its remedy, a two year delay, should be the same.

On September 29, 1983, my distinguished colleague from Maine, Senator Mitchell offered an amendment to correct what Senator Dole referred to in favorable debate as "a potential mistake in the (Social Security) legislation." He also said, " I believe this provision could have unintended and undesireable consequences....(The two year delay) would allow us time to consider carefully the ramifications of this provision."

I believe the Chairman and the ranking minority member were clearly justified in supporting the Mitchell amendment. The inclusion of retired federal judges in Social Security was not debated in the Senate nor was it a provision recommended by the National Commission. It was a House provision accepted by the Conference Committee, a provision that had not been thoroughly examined.

Senator Bumpers, my colleague from Arkansas, pointed out in debate that "we can ill afford to lose the services (of federal retired judges) because of a penalty which we inadvertently placed on them in our efforts to insure the solvency of the social security system."

In a similar manner, the Congress failed to address the issue of taxing churches. I have not found a single statement in a congressional report that says that Congress made a decision to reverse over two hundred years of precedent to begin taxing churches.

It is my contention that Congress did not decide to tax churches. That was not the intention at all. The intention was to raise revenue, reduce expenditures and make Social Security solvent.

In addition, it was believed that the inclusion of non-profit organizations in the Social Security system would move the country closer to universal coverage, which it does. But these objectives must not be accomplished at the expense of a violation of the free exercise of religion, one of our fundamental freedoms.

CONCLUSION

I do not presume to know the will of the Senate with regard to how it might choose to legislate to accomodate the free exercise of religion in this case. A simple repeal of the provision is one option. Another option, with a smaller revenue impact, would be the development of a special coverage status that would place the full tax on employees with no employer contribution, and thus no church payment of taxes. This would be similar to the method used to accomodate ordained ministers, members of religious organizations, and Christian Science practitioners. Other options may be available as well.

Although this hearing is an important first step, it is imperative that extensive hearings be held on the options available to the

Congress to solve this serious problem. I am hopeful that the Senate Finance Committee will pass S. 2099 and recommend its passage to the full Senate. I believe that the record of this hearing, both written and oral arguments, will show that a two year delay is a reasonable, sound and prudent decision that Congress should make. A decision that would not jeopardize the Social Security reform package, but rather, would strengthen the faith of all Americans who believe that when an oversight has been made, legislators of good will will work to correct it.

Senator EAGLETON. My statement will be abbreviated.

I appreciate the opportunity, Mr. Chairman, to appear before you today concerning the constitutionality of Congress requiring religious organizations, including churches and their employees, to participate in the social security system.

When Congress so voted last March, it broke with the Social Security Act's historic tradition since 1935 of rejecting mandatory coverage of these organizations. Mandating participation of religious organizations in our tax system, I believe, violates the constitutional principle of religious liberty required by the First Amendment and as embodied in more than 100 years of Supreme Court jurisprudence.

Should Congress fail to amend the social security package, I fear that the provision about which we speak will fall prey to constitutional attack.

Senator Jepsen has introduced legislation which I support, providing a 2-year delay in implementation of the 1983 amendments as applied to religious institutions, to allow Congress the time it needs to explore the legal and policy ramifications.

This afternoon I would like to briefly outline the constitutional argument as I see it:

The Supreme Court interpretation of the first amendment's religion clauses has shown great sensitivity to the tension between religion and Government. In the 1963 landmark case of *Sherbert* v. *Vernor* the Court broke new ground in announcing that there was a duty to weigh the damage to an individual's freedom of conscience against the harm to the Government's legislative scheme. Of further significance, the Court stated that because this was a constitutionally sensitive area, the Government must show that a compelling interest justified its action.

In applying this "interest-balancing test," the Supreme Court has found some religious exemptions likely to endanger the effectiveness of important Government programs; but in numerous cases the Court has found that even despite regulations of general applicability, there are certain activities protected by the free exercise clause and thus beyond the control of Government.

Mr. Chairman, particularly when the church itself and not merely a parishioner is affected by a Government activity, the Supreme Court has been most sensitive to first amendment consider-

ations and extremely loathe to balance the competing interests in favor of the Government. The result is in order to maintain the so-called "wall of separation between church and state." And it is this concern which is at the heart, I believe, of today's hearing.

As for as I know, in each of the cases pertaining to either regulation or taxation of the church itself, the Supreme Court has rejected the Government's case on the theory that it keeps the Government and the church far apart from each other, recognizing that neither should involve itself with the work of the other.

The premier case in underscoring the need for church-state separation was the 1969 Supreme Court case of *Walz* v. *Tax Commission,* holding that church real property should remain tax exempt in order to properly "insulate" each from the other.

There are two other pertinent cases affirming this principle: *NLRB* v. *Catholic Bishop of Chicago,* a 1978 case, and *St. Martin Evangelical Lutheran Church* v. *South Dakota,* a 1980 Supreme Court case.

My full text for the record goes into greater length, but suffice it to say that while the Court declined to reach the first amendment issue in those two cases I just mentioned, and resolved them on the basis of statutory interpretation, it strongly believed the religious interest could have been paramount over the Government's interest.

Let us consider the interests at stake regarding mandatory social security coverage of religious institutions. The Government's interests include cost, uniformity, and the possibility that a religious exemption may cause harm to others—strip classes of people of a secure retirement, or grant a benefit to a religion.

As my fuller text for the record concludes after more lengthy analysis, in none of these areas can Government make a persuasive case. Cost can't be a real issue, because the vast majority of religious institutions choose to participate under the optional method prior to 1983. Uniformity would not be disrupted for the same reason. There would be no boon to the church, because where employees do not pay into the system they don't receive any of its benefits. And finally, employees not covered as a result of their employer's exemption can be protected in retirement through private plans.

The Government has no more than a negligible interest, especially when weighed against a potent first amendment interest. The church's interest, which is at stake over this optional exemption, is simply this: Freedom from Government interference.

The tax system inevitably involves the Government in the operations and finances of the enterprises it oversees and investigates. And in that *Walz* case mentioned earlier it was decided precisely on this basis, wherein the Supreme Court was concerned particularly with "conflicts that follow in the train of those legal processes."

Despite my strong belief in the constitutional infirmity of mandating participation, there is no real way to firmly predict the constitutionality of our action; for, in First Amendment cases such as these, the Supreme Court "interest balancing approach" is inevitably somewhat ad hoc. However, considerations beyond constitution-

al ones, those of policy and practicality, I think also dictate strong separation of church and state.

Some of my colleagues may feel reluctant to reopen the carefully crafted 1983 amendments for fear it may encourage a floodgate of modifications. While I do not effect that will happen, my own view is that if the reasons for such actigns are compelling, as I believe they are in the instant matter, we ought to entertain narrow reconsiderations.

Some of us here today have already supported one such reopening of the 1983 amendments, regarding a 2-year delay in social security coverage of retired Federal judges on active duty. And on September 29 we adopted a 2-year delay to evaluate the impact of that measure.

More recently, Chairman Dole and Chairman Rostenkowski circulated a letter indicating that the social security package should be amended in yet another area, namely, coverage of congressional employees. The chairman's own willingness to reopen the package certainly reinforces the point that a massive piece of legislation adopted in the heat of compromise should not be forever viewed as sacrosanct, especially when serious problems stand uncorrected.

Thank you, Mr. Chairman, for allowing me to present my views, and I urge that this committee endorse the Jepsen legislation, providing time for further study in order to save ourselves from later constitutional challenge.

The CHAIRMAN. Well, thank you very much, Senator Eagleton. I appreciate very much your testimony and your interest.

Just so the record is clear, with reference to other coverage modifications, neither of these issues involved recommendations of the National Commission on Social Security Reform, and neither involved provisions that were in the Senate bill. We didn't have the judges in the Senate bill.

And as far as the employee provision is concerned, that would tighten the amendments. I mean, what we had there was an opportunity for Hill employees to opt in and out, and not really do anything. So we tried to tighten that up.

But I think it does indicate that nothing is sacred. If in fact there is a case made for any amendment, and if a mistake has been made, it ought to be changed. I think that is the purpose of the hearing. And I certainly appreciate your testimony.

Senator EAGLETON. Thank you, sir, very much.

The CHAIRMAN. You may have other things you need to do, but, if not, we will now hear from an expert on the constitutional issue.

I am not a real expert on deciding constitutional questions, but we would be happy to have a summary of your testimony, Mr. Ball.

Do you plan to go to court with this?

Mr. BALL. Are you speaking to me, Senator?

The CHAIRMAN. Yes.

Mr. BALL. Are we going to court? That, I don't know, Senator.

The CHAIRMAN. OK. I was just curious. I am the curious type. [Laughter.]

The CHAIRMAN. All right. Well, we got this far, anyway. Go ahead.

STATEMENT OF WILLIAM BENTLEY BALL, PARTNER, BALL & SKELLY, HARRISBURG, PA.

Mr. BALL. Thank you.

I want to thank you and the committee very much for inviting me to testify here today. I speak, Senator, from a background of a specialized practice in the field of constitutional law. I have been involved in teaching and writing and litigating in that area for the past quarter of a century, including conducting a number of cases in the Supreme Court of the United States.

Because constitutional law does not exist in a vacuum, I have alluded in my prepared testimony to the testimony of individuals and the concerns of persons who are involved in the real-life business of living out constitutional problems, and I refer here to the testimony of the executive director of the Association of Christian Schools International, Dr. Paul Keenel, and of the expression to me, which I have reflected in my testimony, made by Amish people in 20 States through the National Committee for Amish Religious Freedoms.

Now, to start with, I think we have to ask what justifications have been advanced on behalf of the 1983 amendments.

First, it's said that churches and other religious bodies should be fair to their employees. But churches are the most voluntary of voluntary organizations, and there is no evidence whatever that churches are generally unfair to their employees, or indeed that most church employees demand social security coverage.

Second, it is said that religious bodies must help salvage the social security system. But whether churches are in or out of the program will not affect in any appreciable way the future of that program.

Third, it is sometimes said, and it has been said in these debates, that churches and other faith communities ought to pay their social dues. But the churches don't owe any social dues. Certainly, the liberties of churches may not be constricted by a bureaucrat's or judge's idea of that is socially worthwhile. Our Constitution speaks of the free exercise of religion, not of the free exercise of these religions which Government determines to be socially acceptable.

Imposing the social security program on religious bodies is wrong for four reasons—and here I am merely summarizing points, Senator:

First, it is a tax on religion. The entire religious enterprise is taxed by virtue of the 1983 amendments. And let no one say that the tax should be acceptable because it is initially small. If you can tax religion a little, why not a lot? And if you can tax it in one way, why not tax it in many ways? And if you can tax it to bolster up a certain social program of the Government, why not tax it to bolster up other programs which are in difficulty? This is watershed legislation.

And it is the history, the very history of taxation in our country, that once a tax is imposed, there is a downhill thrust that is going to take it much further. And this is of profound concern to churches as they face the novelty of this tax.

Second, it constitutes a governmental intrusion into the employment relationship within a church or religious body. That is to say, it invades the faith community. It regulates a ministry, and that is certainly not Government's right.

Our country has always recognized the liberty of churches and other faith communities to establish their own internal arrangements and all other aspects of their self-government. These religious bodies differ from secular nonprofit organizations by the very fact that their employees typically serve because of a faith commitment; hence, often at deliberate economic sacrifice. It is an essential part of the constitutional liberties of religious bodies to be able freely to make those arrangements within their faith communities which, with their usually limited means, their sense of mission, and their sense of the providence of God, as they perceive it, dictate. It is certainly no business of Government to impose social programs on churches or religious ministries which those bodies, following their own religious principles, do not deem suitable to their mission, or which they may even regard as being inhibitive to that mission.

Look now to the two religious bodies to which I had made reference a few moments ago. Many schools of the Association of Christian Schools International, for example, have designed and put into operation various forms of insurance for their employees. The Amish, on the other hand, don't want that insurance. They don't want a program such as this. They find it religiously unacceptable. With neither group is a Government-mandated social security program desirable or acceptable.

Third, the amendments commandeer the use of trust funds. People, entrust money to churches for the specific religious purposes of churches. And it is utterly wrong for Government to try to divert that money away from those purposes, indeed, into social programs in which the churches don't choose to participate.

Now, these three factors plainly burden the free exercise of religion. And of course, religion may be constitutionally burdened by governmental actions under the decisions of the Supreme Court. But under what circumstance? The circumstance is a singular circumstance, and Government, where it is going to burden religion, has an enormously high hurdle it must cross—namely, what the Supreme Court has called the hurdle of compelling societal interest, or compelling state interest.

This is an interest that is not a mere public interest; it is an extraordinary interest, and one of an extremely high nature.

When we speak of compelling state interest, we are at once faced with a question of burden of proof. And under the Sherbert test, to which Senator Eagleton referred, that burden of proof rests not on the taxpayer, not on the religious claimant, but on government. And here, looking at the record in this case, we don't find in the Congressional Record a single scrap of evidence which justifies calling the imposition of this tax on churches a compelling state interest.

Finally, the program definitely breaches the principle of church-state separation by creating forbidden administrative entanglements of government with churches and other religious bodies. I won't dwell on that further in this testimony. Senator Eagleton

well spoke of the problem that this involves. I do, however, come to this consideration, in conclusion: Your committee, I think, is faced with a very, very serious problem, and I think we all appreciate that it got to this position perhaps with some haste and perhaps with insufficient knowledge of the facts.

We would hope that your committee would recommend that a limited moratorium such as the Jepsen bill proposes would be placed on the enforcement of these amendments against religious bodies.

Many of America's churches don't have any lobby; they have no means of getting at Washington. And the flow of information to many religious organizations is very, very slow, as well as getting advice which really adequately can brief them on what legislation is all about. I can assure you that many Amish and Mennonite churches, in fact all that I know of, and I am in contact with many of them, are completely caught by surprise suddenly to hear for the first time that they were to be taxed and were to be mustered into the national social security program.

So, cost certainly, a period of grace is needed, urgently needed—absolutely needed—in order that mature consideration can be given to the first amendment problems which are plainly present here.

It cannot be doubted that principles of religious liberty and church-state separation are important enough to warrant pause in this matter.

Finally, I think we are all aware that there are religious groups which have favored the 1983 amendments. Yet, they cannot speak for others who do not; each may have a different religious point of view with respect to the significance and impact of the amendments.

Obviously, any religious body that desires to be under the program should have the right to be under it, and the means should be found whereby it can opt to be under it. But religious liberty is a two-way street, and those which resist it, as do many indeed, ought not to be forced into it.

I thank you very much.

[Mr. Ball's prepared statement follows:]

TESTIMONY OF
WILLIAM BENTLEY BALL, ESQ.
BEFORE
SENATE FINANCE COMMITTEE

RE: CONSTITUTIONAL ASPECTS OF IMPOSITION OF
1983 SOCIAL SECURITY AMENDMENTS ON
RELIGIOUS BODIES

I am partner in the Harrisburg law firm of Ball & Skelly. Over the years, in state and federal courts in 22 states of our nation, and in the Supreme Court of the United States, I have been involved in constitutional litigations. I have lectured and debated on constitutional issues at many universities in this country, and recently in Australia.

I appear here today a lawyer deeply concerned over First Amendment freedoms. In the matter at hand, I have the advantage of being counsel to two organizations which live, not in the domain of legal theory, but in the reality of being religious bodies, serving churches and religious schools in many parts of our nation. One of these organizations is Association of Christian Schools International and the other is the National Committee for Amish Religious Freedom.

I incorporate by reference, in my testimony today, the statement of Dr. Paul Kienel, Executive Director of the Association of Christian Schools International. This shows better than can any lawyer just how the 1983 amendments to

the Social Security Act affect religious bodies - how adversely they do. Amish people, in 20 states, are also deeply opposed to the 1983 changes. Certainly, though they are a small religious minority - indeed, because they are small - their plea is an important plea.

As my starting point, I take it that the Congress cannot have realized what it did in enacting the amendments. It is completely misleading to talk merely in terms of "including religious bodies' employees in the Social Security program." What has to be faced up to is the fact that the amendments directly tax churches and other religious bodies. They thus tax religion. It is, of course, irrelevant to this discussion that some religious groups favor this tax. That some do not have a religious belief that their churches should not be taxed is no argument that the contrary beliefs of others should not be protected. The Supreme Court has stated that it is not for government to say that what is a religious belief or practice, though of a minority of religionists, is not "religion" under the protection of the First Amendment. Fowler v. Rhode Island, 345 U.S. 67, 69-70 (1945).

There are three basic constitutional objections to the mandating of the tax upon religious bodies:

1. The amendments intrude upon the right of churches and other faith communities to their own self-governance.

2. The amendments tax religious exercise.

3. The amendments excessively entangle government in the affairs of religious bodies.

May I now address these three objections.

I. SELF-GOVERNANCE OF RELIGIOUS BODIES

When I speak of "religious bodies" today, I speak of churches, but also of those ministries of churches which are integral to the churches, or are founded for religious purposes solely and are pervasively religious in character.

The Supreme Court has often affirmed the protected religious liberty of churches. Kedroff v. St. Nicholas Cathedral, 344 U.S. 94, 116 (1952); Serbian Orthodox Diocese v. Milivojevich, 426 U.S. 696 (1976). By the necessary implication of these decisions the liberties of religious ministries are likewise protected. Church-schools, for example, have been held by the Court to be "an integral part of the religious mission of their sponsoring churches (Lemon v. Kurtzman, 403 U.S. 602, 616 (1971)), that mission being "the only reason for the schools' existence" (Meek v. Pittenger, 421 U.S. 349, 366 (1975)); whose "affirmative, if

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not dominant, policy is to assure future adherents to a particular faith by having control of their education at an early age." Tilton v. Richardson, 403 U.S. 672, 685-686 (1971).

Our country has always recognized the liberty of churches and other faith communities to establish their own internal arrangements and all other aspects of their self-governance. These religious bodies differ from secular nonprofit organizations by the very fact that their employees typically serve because of a faith commitment - hence often at deliberate economic sacrifice. It is an essential part of the constitutional liberties of religious bodies to be able - freely - to make those arrangements within their faith communities which, with their usually limited means, their sense of mission (and of the providence of God, as they perceive it) dictate. It is clearly no business of government to impose social programs upon churches or religious ministries which those bodies, following their own religious principles, do not deem suitable to their mission, or which they may even regard as being inhibitive to their mission. Look, now, to the two religious bodies of which I have spoken here today. Many schools of the Association of Christian Schools International have designed and put into operation various

forms of insurance for their employees. The Amish, on the other hand, "maintain positive religious teachings and attitudes toward helping all their needy neighbors. They are deeply sensitive to any forces that would erode the principle of self-sufficiency in caring for their old people, widows, and orphans."* With neither group is a government-mandated Social Security program desirable or acceptable.

Central to the self-governance of religious bodies is their ability to utilize the funds which are entrusted to them for their reilgious purposes. The faithful (and they are typically family people engaged in close battle with the cost of living) give of their money to religious bodies out of the deepest sense of commitment to ther religious ideals and goals of those bodies. And the churches and other faith communities (also typically engaged in a close battle with economics) choose, as part of their inherent liberties, those activities which their religious principles bind them in consicence to pursue. This process of choice may

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* The quotation is from the classic treatise on the Amish, AMISH SOCIETY, by John A. Hostetler (John Hopkins Press, 3rd ed., 1980).

necessarily cause them to reject certain activities. It is not the business of government to impose itself upon that choice and to dictate that any part of the stewardship funds will be siphoned off to support programs not chosen - or programs conscientiously refused.

Mr. Chairman, may I say at this point, that the Committee is to be congratulated upon the holding of these hearings. I indeed must ask: had the Congress remotely considered the issue which I am here discussing? Had the Congress bothered to brief itself fully on these facts before saddling all churches and all religious bodies with this highly intrusive program?

I shall hold, for the moment, the question of whether a "compelling state interest" (i.e., a compelling societal need) may be said, constitutionally, to justify this intrusion by government upon the rights of religious bodies to their own self-governance. Let me next come to the second constitutional objection to the 1983 amendments.

II. TAXATION OF RELIGIOUS EXERCISE

The amendments are plainly a tax on religious exercise. Calling them simply a tax on the employment relationship does not avoid that fact. Churches and their ministries are nothing more or other than a form of "religious exercise".

It is to be hoped that the Congress will soon come to an understanding of what it has done in imposing - for the first time - a tax on religion. It has not only said, in effect, that churches and other religious bodies must pay, if they are to carry out their God-given mandate - or else suffer prosecution and penalties; it has also set the stage for further taxation. Once a body is under the tax structure, it is the inevitable sequence of events that taxation is increased - and increased. Anyone is blind who imagines that the tax of 5.7% will not go up. Again note: if religious bodies can be taxed a little, why not a lot?

But, I should add, this tax is not "a little". Its effect, on many religious organizations, will be very heavy. Here again I stress that the Congress should certainly be aware that most religious organizations have a constant struggle financially. The Amish churches and schools, and the churches and schools related to the Association of Christian Schools International, accept not a cent of public funds.

The Supreme Court has long insisted that religious liberty is a "preferred" freedom (Murdock v. Pennsylvania, 319 U.S. 105, 115 (1943)), and that the exercise of First Amendment liberties may not be conditioned upon the payment

of taxes. Grosjean v. American Press Co., 297 U.S. 232 (1936). The framers of the First Amendment were aware of, and rejected, the view that taxes might be imposed whose "main purpose. . . was to suppress the publication of comments and criticisms objectionable to the Crown." Id. at 248, 246. Certainly it is unthinkable today that religious expression may be taxed because it includes purposes objectionable to any branch of government.* The taxation of a religious ministry which does not depend upon, or seek, public funding, and which is utterly dependent upon the religious community which it serves, is of potentially devastating effect. The tax ordinance found violative of Free Exercise in Murdock v. Pennsylvania did not require the altering of any religious teachings or the violation of any beliefs. It was nevertheless found to burden the exercise of a religious ministry.

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* As the Court stated in Sherbert v. Verner:

> "Government may [not]. . . penalize or discriminate against individuals or groups bcause they hold religious views abhorrent to the authorities. . . nor employ the taxing power to inhibit the dissemination of particular religious views. . ." 374 U.S. 398, 402 (1963).

Nevertheless, the Supreme Court has held that religious liberty is not absolute. More than a century ago, the Court stated that, for example, religious liberty does not give one - regardless of his sincerity - the right to practice human sacrifice in the name of religion. Reynolds v. United States, 98 U.S. 145 (1878). Where does the boundary limiting religious exercise lie? The answer is: far out. The Court, in Sherbert v. Verner, 374 U.S. 398 (1963), stated the test which governmental regulation which burdens the free exercise of religion must meet. "Such imposition", said the Court, must be justified by a compelling state interest. . ." The Court illuminated the concept of "compelling state interest" as follows:

> "It is basic that no showing merely of a rational relationship to come colorable state interest would suffice; in this highly sensitive constituitonal area, '[o]nly the gravest abuses, endangering paramount interests, give occasion for permissible limitation'." Id. at 406.

And see Wisconsin v. Yoder, 406 U.S. 205, 215 (1972).

Under the Sherbert-Yoder test, therefore, it is necessary to inquire: (1) Does a genuine religious liberty claim here exist? (2) If so, do the amendments violate that liberty? (3) If so, is that violation nevertheless justified by a compelling state interest?

z Of course a genuine religious liberty claim exists here. And nothing could be clearer than the fact that taxation is, in the constitutional sense, "injury" to the subject taxed. Let me pause here. It has been said in some quarters of late that the tax in question is really one which should be considered as a "normal business operating expense" in today's welfare-conscious world. Well and good, if you are a business. But churches and other faith communities which accept no governmental funding are not businesses.*

Further, reference has been made to the notion that the Supreme Court, in Braunfeld v. Brown, 366 U.S. 599 (1961), sanctioned taxation of religion where the tax burden was said to be only "indirect". But the dictum from Braunfeld in no sense sustains a principle that government may tax religious activities or enterprises if the only effect of the tax is to render these, as one commentator stated, "somewhat more expensive". Obviously, to render any activity "more expensive" may retard that activity.

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* And those few, highly publicized aberrant situations, in which "religious" racketeering takes place may not be equated with 99% of the church and other religious endeavors across our land.

Braunfeld involved a state's Sunday closing law challenged by Orthodox Jewish merchants under the Free Exercise Clause. The law barred them from selling on Sunday, while their religion barred them from selling on Saturday. The combined effect was potentially to reduce their personal incomes. No tax was involved, and no imposition directly upon a religious activity, practice or relationship. The closing law did not bar, refer to, or in any way deal with, the Orthodox Jewish Sabbath or services. Nor did it deal with religious observance on Sundays. It simply regulated secular activity on the latter days. Hence the Court was able to characterize the law's effect on the Orthodox Jewish merchants as "indirect". Id. at 607. This is radically different from the situation here where not only is a tax involved but that tax is imposed directly on all aspects of the religious enterprise.

Again: in Establishment Clause cases the Supreme Court has most carefully stressed that the dollar-amount smallness of an exaction of public funds for religious purposes does not relieve the exaction of unconstitutionality. Committee For Public Education v. Nyquist, 413 U.S. 756, 787 (1973). And see Justice Black's famous discussion in Everson v. Board of Education, 330 U.S. 1, 16 (1947), that the

Establishment Clause means, at least, that "No tax, in any amount, large or small," for religious purposes may be valid. (Emphasis supplied). Madison's remark, in his Memorial and Remonstrance about "three pence"* has been cited with approbation by the Supreme Court. See Flast v. Cohen, 392 U.S. 83, 103 (1968). The same reasoning would appear essential in free exercise situations where government claims that it may tax religion provided that the tax is merely small ("incidential"). I repeat: if religion can be taxed a little, why not greatly? And if religion can be taxed a little with one tax, why not a little again with another tax - and still again other "small" taxes?

To come now to the third part of the Sherbert test: Does a compelling societal interest dictate the imposition of the 1983 amendments on religious bodies? Here the burden of proof is not on the religious body; the burden of proof shifts to the government. Government is required to show how and why it claims that a supreme public interest justifies its imposing of its program.

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* ". . . the same authority which can force a citizen to contribute three pence only of his property for the support of any one establishment, may force him to conform to any other establishment in all cases whatsoever." 2 WRITINGS OF JAMES MADISON, 183, 186 (Hunt ed. 1901).

I know of not a scrap of proof of any such interest on the part of the United States. Plainly, none exists.* If it be ventured that the churches must be mustered to bolster up an endangered Social Security fund, that argument must be rejected. On that theory

a. the taxation of religion will only have begun with the 5.7% tax, and

b. why not tax religion to bolster up every other financially endangered governmental program?

Gentlemen of the Committee: here is where we all need recourse to the great statement of Madison when, in his great Memorial and Remonstrance Against Religious Assessments, he warned of the major significance of "minor"violations of religious liberty:

> ". . . It is proper to take alarm at the first experiment with our liberties. . . The freemen of America did not wait until usurped power had strengthened itself by exercise, and entangled the question in

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* Nor can the Congress show that less restrictive means do not exist for satisfying what need there may be for affording financial protection to church employees. Indeed, the issue of "less restrictive means" is not even germane to this inquiry, because there exists no duty on the part religious bodies to create insurance programs.

precedent. They saw all the consequences in the principle, and they avoided the consequences by denying the principle."*

III. CHURCH-STATE SEPARATION VIOLATION: EXCESSIVE ENTANGLEMENTS

Lastly, I call the attention of the Committee to the constitutional prohibition, derived from our principle of church-state separation, which forbids government to enter into relationships with religious bodies which are "excessively entangling" (as the Supreme Court has phrased it). The Court has repeatedly held that any substantial involvement of government in churches or their schools is violative of the Establishment Clause. In Walz v. Tax Commission, 397 U.S. 664 (1970), the Court warned against governmental involvements with churches which produce "a kind of continuing day-to-day relationship which the policy of neutrality seeks to minimize." The Court did so in the specific context of social services and aid to children carried on by churches. The Court warned, on Establishment Clause grounds, against legal policies which can lead to "confrontation and conflicts" between government and churches. Id. at 674.

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* As quoted in dissenting opinion of Rutledge, J., in Everson v. Board of Education, 330 U.S. 1, 63 (1947).

In Lemon v. Kurtzman, 403 U.S. 602 (1971), the Court described as a "classic warning" Mr. Justice Harlan's separate opinion in Walz wherein he spoke of "programs, whose very nature is apt to entangle the state in details of administration." Id. at 615. The Court also warned against "sustained and detailed administrative relationships [between government and these schools] for enforcement of statutory or administrative standards." Id. at 621. The Court was particularly concerned with the relationship of lay teachers to the Catholic schools in which they are employed and the potential for excessive church-government entanglements arising from government intervention in that relationship. Id. at 617. It held the programs creating intervention in that relationship unconstitutional.

In all of the foregoing decisions of the Supreme Court of the United States, the Court went so far as even to state that actual entanglements need not be found: the potential for those entanglements is sufficient to invalidate the governmental programs. Marburger, supra, at 41; Meek, supra, at 372. That is to say, the separation of church and state must be, not likely or probable, but "certain". Meek, supra, at 372.

Thrusting churches, church-schools, and other faith communities into the Social Security program does indeed run counter to the principle of church-state separation. The 1983 amendments call for governmental surveillance of religious bodies to monitor their compliance with the legislation. This monitoring must take place through the forms of reporting to be submitted and checked, inquiries into the employment relationships, and various other administrative involvements which plainly will thrust government well into the religious precinct.

CONCLUSION

What should your Committee now recommend? First, it should recommend that a limited moratorium be placed upon the enforcement of the amendments against religious bodies. Many of America's churches have no lobby, either at Washington or at the grass roots locally. The flow of information to many a religious organization is extremely slow and tenuous. Many a church and many a faith community in the United States have no attorney on day-to-day retainer, who can brief them on legislation in process at Washington. I can assure this Committee that Amish and Mennonite churches were caught completely by surprise suddenly to hear that, for the first time, they were to be

taxed and they were to be mustered into a Social Security program.

Most certainly, a period of grace is urgently called for. That period is absolutely needed in order that mature consideration may be given to the First Amendment issues plainly present. Can it be doubted that the principles of religious liberty and church-state separation are not of great enough value to warrant pause in this matter? You have turned an historic corner. Do not, we would beg, go down the street of violation of those principles, before you have given yourselves the chance to consider what this would mean. I hope you will support Senator Jepson's proposal for the two-year stay.

Secondly, of course, a substantive amendment, exempting religious bodies who desire exemption, is the ultimate need. At this reading, it appears that not all religious bodies do desire exemption. Well and good: religious liberty is a two-way street. Those religious bodies which desire to be taxed and to come under the Act should be given that option.

The CHAIRMAN. Thank you.

If you would just excuse me for 1 minute, I have a group of future farmers who want to just say hello to me. They are also voters. [Laughter]

[Whereupon, at 2:29 p.m., the hearing was recessed.]

AFTER RECESS

The CHAIRMAN. Mr. Ball, as I understand your brief testimony—I have had a chance to just scan through the statement—your concern seems to be of the taxing of religious organizations, not the taxing of individuals in religious organizations. In light of this, do you see a constitutional problem in treating the employees of religious organizations similarly to ministers, that is, similarly to the self-employed? This way there would be no tax on the employer, the church, only on the individual.

Mr. BALL. Well, it certainly would be a step away from this, and that in itself would be good, anything that would depart from the taxation of the religious body.

The CHAIRMAN. That is an area I think we might want to focus on; so I don't ask you to make any flat statement for or against that idea, but it is something you might want to consider.

Mr. BALL. Yes. I have an offhand reaction, which is indeed not a mature reaction. If the mandatory tax were imposed across the board to all employees of religious organizations, conceivably this could raise certain first amendment considerations.

Basically I think, as I said a moment ago, the relieving of the religious organization itself would be a salutary thing, provided that we are not to a degree substituting a burden on the organization through its employees. But I should like to respond to that more at length in a communication that I would like to submit.

The CHAIRMAN. Fine.

Now, you define "religious bodies" in your testimony. I am not certain you have had an opportunity to check the definition in the Jepsen bill, but if you haven't had a chance to do that, it might be helpful. It delays coverage for nonprofit organizations with religious affiliation.

Mr. BALL. Yes.

The CHAIRMAN. Now, would this bill delay coverage for a large nonprofit hospital, for example, which had only a marginal religious affiliation?

Mr. BALL. I think the preferable way that that should be treated would be to use language similar to what the Supreme Court used in *Lemmon* v. *Kurtzman*, where it spoke and virtually defined the Catholic parochial school, and by implication all similar ministries, as integral parts of the religious mission of the church.

And where I think an organization is an integral part of the religious mission of the church, or is similarly pervasively religious—and I realize there is some need for further definition in that area—then I would think it ought to fall within the exemption that I hope the Congress would give.

The CHAIRMAN. Well, if you have no objection, we may want to submit additional questions to you in writing. We won't burden you with a lot of questions, but there may be other questions that we will have after we have had a chance to review your entire text plus hearing other witnesses.

We appreciate your testimony. I would say at the outset that I am indebted to Senator Jepsen for urging these hearings, and I regret that because of other business conflicts, he cannot be here; but his statement has been made a part of the record.

We are here to try to determine what, if anything, should be done, and we appreciate your coming.

Mr. BALL. Thank you very much; I appreciate being invited.

Thank you.

The CHAIRMAN. We now have a panel consisting of Rev. Bill Brewer, pastor and vice chairman, Kansas Baptist Bible Fellowship, from Bonner Springs; Pastor Olen Adams, Quint City Baptist Temple, Davenport, Iowa; Dr. Greg Dixon, pastor, Indianapolis Baptist Temple, and national chairman, American Coalition of Unregistered Churches, Indianapolis, Ind.; and Rev. Charles Bergstrom, executive director, office of governmental affairs, Lutheran Council, U.S.A.

Unless there is some objection, you can proceed in the way your names were called, with Reverend Brewer being the first.

STATEMENT OF REV. BILL BREWER, PASTOR AND VICE CHAIRMAN, KANSAS BAPTIST BIBLE FELLOWSHIP, BONNER SPRINGS, KANS.

Reverend BREWER. I appreciate being here today. I think it is rather significant, and I appreciate the fact that Senator Dole took time for the Future Farmers of America, because they were future voters.

The CHAIRMAN. Only one out of the six was from Kansas.

Reverend BREWER. Is that right?

The CHAIRMAN. You can't win them all. [Laughter.]

Reverend BREWER. I appreciate being here from Mid-America, from the State of Kansas. In the last 2 days I have been meeting with Kansas pastors, along with the Kansas Baptist Bible Fellowship and also with Fellowship Baptist Schools of the State of Kansas, so we are concerned about this bill that's been passed.

I want to read a statement and then make a few statements about it. I am not an expert, because an expert I have been told is a little spurt away from home. So I am here from Kansas, and I don't guess anybody in Kansas is supposed to be an expert—I'm not sure. [Laughter.]

But we have some strong convictions about what we are here to do today, and the reason we are here has to do with the mandatory coverage of FICA taxes of nonprofit organizations.

I am the pastor of a local congregation in Kansas. I have been a pastor there for 26 years now. I am also vice chairman of the Kansas Baptist Bible Fellowship, a fellowship of churches, around 135 churches, across the State, and we are very concerned about churches being compelled to be a part of the social security program.

In this statement I say that I am a flag-waving brand of citizenry in the United States of America. I was in the U.S. Navy both during the Second War and during the Korean war. I believe also that every church member, especially every churchgoer, ought to be an active part, an active citizen, of the betterment of America.

I also am very concerned, however, about the Government interference in the rights of the local congregation of churches. I believe very strongly that we have had and do have a different, far better country than most other nations of the world because we have had freedom to worship and operate within the confines of the sovereignty of these local congregations.

I would like to read a portion of scripture having to do with that, because we are here today not just because we have some exterior abhorrence to this bill; we are here because we have some strong convictions about what we are doing, and the Bible is our textbook. We believe that nothing supersedes this, really.

In Acts, chapter 20, in verse 24, Paul says:

> But none of these things move me, neither count I my life dear unto myself, so that I may finish my course with joy, and the ministry, which I have received of the Lord Jesus Christ, to testify the gospel of the grace of God.

So, we are here because we believe our churches are a ministry of the Lord Jesus Christ, and those pastors minister under His command.

Now:

> Behold I know that ye all among whom I have gone preaching the Kingdom of God shall see my face no more; wherefore I take you to record this day that I am pure from the blood of all men, for I have not shunned to declare unto you all the counsel of God.

Then I believe something that maybe is hard for all to understand, the responsibility that we pastors feel in local congregations, because in Verse 28 it says:

> Take heed, therefore, unto yourselves and to all the flock over which the Holy Ghost hath made you overseers, to feed the church of God which He hath purchased with his own blood.

We represent today, we believe, not just an organization or not some other organization. I believe I am very emphatic about this, that I represent the church of the Lord Jesus Christ. It says here it was so precious that "He purchased it with his own blood."

So, when we talk about the sovereignty of our local congregations, we believe it is more than just another organization.

I believe the Bible teaches that Jesus Christ is Lord of these churches, and we are to render unto Caesar those things that are Caesars but also to the Lord the things that are His.

Little by little, we see and feel the encroachment of Government into the affairs of local congregations. The taxing of these churches by way of FICA taxes is just one more step toward a regulating of these local congregations.

In my 26 years in the ministry I have not faced such an awesome decision as I am not facing concerning social security regulations.

I trust the amendment that has been introduced by Senator Jepsen from Iowa will receive your consideration, Senator Dole, and this committee's consideration and give us time to work out some alternate plan.

Then, the last statement in my prepared statement is that our churches just must not be participating in being taxed by the Government.

On the other hand, I would like to say this, that we feel very strongly that this is a tax upon our churches. We can't see it any other way, that it might be called something else. We believe that our churches are being taxed.

We are not against our people paying taxes as individuals, because our people are taxpaying people; but we are concerned about what this heads up and what it is going to cause among our local congregations.

Because Senator Hanson mentioned this in the news conference a while ago, I think that I could also mention it, because I am just across the border from Nebraska. I have been in that situation where the pastor has been put in jail for conscience sake, and seven members of his congregation are now in jail. All they are trying to do is to carry out their religious conviction of having a school in their local church. And there are some strong convictions across the country in the pastors that I am familiar with. If that is a strong conviction about having a school in your local church,

then it is a very strong conviction that we must not allow this to be a taxation of our churches.

I appreciate being here today, Senator.

The CHAIRMAN. Thank you.

Reverend Adams.

[Reverend Brewer's prepared statement follows:]

REV. BILL G BREWER
Pastor
Phone 441-3530
446 Emerson

BIBLE BAPTIST
CHURCH
Just off the Morse St. Exit
426 EMERSON

P O Box 8
Bonner Springs
Kansas 66012

December 8, 1983

Committee on Finances
S D 215
Washington, D.C. 20510

Dear Mr. Dole and Finance Committee:

I am writing concerning the hearing of the Finance Committee on the fourteenth of December, 1983, the subject being mandatory coverage of F.I.C.A. taxes of nonprofit organizations.

I am the Pastor of a local congregation of people and also Vice Chairman of Kansas Baptist Bible Fellowship. This fellowship of churches comprises around 135 congregations across the state of Kansas. We are very concerned about the churches being compelled to be a part of the Social Security program of the U.S. government.

I am the "flag-waving" brand of the citizenry of the United States of America. I was in the U.S. Navy in both World War II and Korea. I also believe every church member, and especially every church-goer, ought to be an active citizen for the betterment of America.

I am very concerned, however, about government interference in the rights of local congregations of

churches. I believe very strongly that we have had a different, far better, country than most other nations of the world because we have had freedom to worship and operate within the confines of the sovereignty of our local congregations (the freedom of religion and the free exercise thereof).

I believe the Bible teaches that Jesus Christ is Lord of these churches and we are to render unto Caesar (Government) those things that are Caesar's, and to the Lord those things that are His.

Little by little we see and feel the encroachment of Government into the affairs of local congregations. The taxing of these churches via F.I.C.A. taxes is just one more step toward the regulating of these local congregations.

In my 26 years in the ministry I have not faced such an awesome decision about what to do as I am now facing concerning this Social Security Regulation.

I trust the amendment that has been introduced by Senator Jepson from Iowa will receive your strong consideration. Please, Mr. Dole and the members of the Finance Committee, give time for the churches that are strongly opposed to the F.I.C.A. taxing the opportunity of an alternate plan.

Our churches just must Not be forced to participate in F.I.C.A. taxing.

Very Sincerely,

Rev. Bill G. Brewer

BGB/dq

25 copies enclosed

STATEMENT OF PASTOR OLEN ADAMS, QUINT CITY BAPTIST TEMPLE, DAVENPORT, IOWA

Reverend ADAMS. Thank you, Senator Dole. I would like to thank you for being here today. I understand this was supposed to have been part of your Christmas vacation.

The CHAIRMAN. We get paid year-round. [Laughter.]

Reverend ADAMS. I appreciate very much the opportunity to speak today. I appreciate Senator Jepsen from my home State, who has influenced much of this.

I come today representing a sovereignty, which is only one of many like sovereigns in the great United States of America, a sovereignty which has raised the standard of living for every country where she has been welcomed, honored, and given a chance to conduct her work according to the word of God, a sovereignty where rejected, fought, or hampered, the country has gone downward in every way, even if continuing to exist at all.

The sovereignty I represent is not a religion; it is a New Testament church of the Lord Jesus Christ.

The church is under orders from her lord and king, who is the Lord Jesus. From the beginning of time, God has retained certain things for himself. First, there was the tree of knowledge of good and evil in the Garden of Eden. A severe consequence would follow if that retention was violated.

Egypt, in the time of the Great Famine under Joseph, place religious men and their land in special positions under Joseph. Under the Mosaic Law, God always placed the Levites in a special place with special concessions for the care of the tabernacle and the continuation of caring for the things of God.

King Artaxerxes, when Israel was under bondage because of their disobedience to God, even there King Artaxerxes in sending Ezra back to rebuild the temple certified that ecclesiastical workers would not be taxed, tolled, or have to pay custom.

The Lord Jesus Christ later established his church, retaining the headship and control.

I will not take time to read all of the scriptures, but they are in the full testimony that you have.

The Lord passed on to His churches the keys to the kingdom and the power of heaven. It is an accepted position today that the power to tax is a power to control. The power to tax actually stakes a prior claim of ownership and control.

I submit to you today that no country has ever suffered any financial loss, educational regression, defense capabilities, disobedience to constitutional law, lack of respect for civil government as ordained by God, by continuing to give this sovereignty her power and her proper place and respect in our great Nation. Please do not attempt to say she is not a sovereignty by attempting to tax her.

I submit that our founding fathers gave her her proper place and sovereignty by the first amendment to our Constitution. Please do not try to institute the law that would prohibit her that free exercise of sovereignty.

The CHAIRMAN. Thank you very much.

Dr. Dixon.

[Reverend Adams' prepared statement follows:]

STATMENT OF PASTOR OLEN ADAMS, DECEMBER 14, 1983

The Honorable Senator Dole and other distinguished members of the Senate Finance Committee:

I thank you for the invitation to testify at this hearing concerning the mandatory taxation of churches in the form of Social Security taxes, which is scheduled to start on January 1, 1984.

Never in the history of our great nation, has the Federal Government dared to tax churches.

We know that God has established, or ordained, civil government. We find in Genesis 9:5 and 6, that civil government was to protect life.

> "And surely your blood of your lives will I require; at the hand of every beast will I require it, and at the hand of man; at the hand of every man's brother will I require the life of man.
>
> "Whoso sheddeth man's blood, by man shall his blood be shed: for in the image of God made he man."

God gave Moses the Law to give the Israelites direction in how to live God-honoring lives. All governments since that time have based their laws on the pattern of God's Law.

We find New Testament statements pertaining to civil government:

> "Let every soul be subject unto the higher powers. For there is no power but of God: the powers that be are ordained of God.
>
> "Whosoever therefore resisteth the power, resisteth the ordinance of God: and they that resist shall receive to themselves damnation.
>
> "For rulers are not a terror to good works, but the evil. Wilt thou then not be afraid of the power? do that which is good, and thou shalt have praise of the same.

"For he is the minister of God to thee for good. But if thou do that which is evil, be afraid; for he beareth not the sword in vain: for he is the minister of God, a revenger to execute wrath upon him that doeth evil."

"Therefore ye must need be subject, not only for wrath, but also for conscience sake.

"For for this cause pay ye tribute also: for they are God's ministers, attending continually upon this very thing.

"Render therefore to all their dues: tribute to whom tribute is due; custom to whom custom; fear to whom fear; honor to whom honour." Romans 13:1-7

"Submit yourselves to every ordinance of man for the Lord's sake: whether it be to the king, as supreme;

"Or unto governors, as unto them that are sent by him for punishment of evildoers, and for the praise of them that do well.

"For so is the will of God, that with well doing ye may put to silence the ignorance of foolish men:" I Peter 2:13-15

From the beginning of time, God has retained certain things for himself. These things were to be under His control and no one else. Severe consequences were to follow when that law was broken: or when God retain my control was violated.

1. The tree of knowledge of good and evil in the Garden of Eden.

   "But of the tree of the knowledge of good and evil, thou shalt not eat of it: for in the day that thou eatest thereof thou shalt surely die." Genesis 2:17

2. The direction of the home.

   "Therefore shall a man leave his father and his mother, and shall cleave unto his wife: and they shall be one flesh." Genesis 2:24

3. When Joseph was in Egypt and had control of everything because of the great famine, he took the land of everyone <u>except</u> the land of the priests.

"Only the land of the priests bought he not; for the priests had a portion assigned them of Pharaoh, and did eat their portion which Pharaoh gave them: wherefore they sold not their lands." Genesis 47:20

4. The Tribe of Levi was separated from the others and special concessions were always made to them because of their caring for the House of God, Tabernacle, etc.

"Take the Levites instead of all the firstborn among the children of Israel, and the cattle of the Levites instead of their cattle; and the Levites shall be mine: I am the Lord." Numbers 3:45

5. King Artaxerxes certified that it was not lawful to impose toll, tribute, or custom upon the ecclesiastical workers.

"Also we certify you, that touching any of the priests and Levites, singers, porters, Nethinims, or ministers of this house of God, it shall not be lawful to impose toll, tribute, or custom, upon them." Ezra 7:24

In the New Testament we find the Lord Jesus Christ establishing the church (assembly of believers). He promised her the power of heaven. He retained the headship of the church. The church is built on Christ.

"And I say also unto thee, That thou art Peter, and upon this rock I will build my church; and the gates of hell shall not prevail against it." Matthew 16:18

"And are built upon the foundation of the apostles and prophets, Jesus Christ himself being the chief corner stone;" Ephesians 2:20

Jesus Christ is the head of the church.

"And he is the head of the body, the church: who is the beginning, the firstborn grom the dead; that in all things he might have the preeminence." Colossians 1:18

Thus, the church is SOVEREIGN. It has been treated as such in America since we became a nation.

Our Federal Government is a sovereign entity, our individual states are 50 separate sovereign entities. One sovereign cannot tax another. The power to tax is the power to control. That which can tax the church, or tax the State, has moved into the position of sovereignty and thus holds the control.

In Matthew, Chapter 22, the Lord Jesus was asked the question if it was lawful to give tribute unto Caesar. This was an individual paying tribute, and not the church. The Lord's answer was,

> "...Render therefore unto Caesar the things which are Caesar's; and unto God the things that are God's."
> Matthew 22:21

It is right for individuals to support their government and render unto their government that which rightly belongs to it. But when money is given to God, it is God's and not to be taken from Him by any means.

The only time in all the Word of God when God's house was attacked, invaded, or ramsacked by governments was when God gave his people over into the bondage of the foreign governments because of their disobedience.

I believe, from a Biblical position, that it would be against God's teaching for my church to be forced to pay taxes.

It is my firm opinion that the new Social Security tax which churches are scheduled to start paying on January 1, 1984, is also unconstitutional. It is against every thought and intent of our Founding Fathers.

I must believe that when the study of 501 (c) (3) organizations were studied as a means of more money for the Social Security program, the fact that churches would be taxed was somehow overlooked. I find it difficult to believe that Congressmen would intentionally and delibertly tax churches in America.

The First Amendment to our Constitution clearly states that, "Congress shall make no law respecting an establishement of religion or prohibiting the free exercise thereof." I submit that this new taxing will do both.

Senator Jepsen's entry into the Congressional Record, Vol. 129, November 15, 1983, No. 158, concerning S.2099, contains ample investigation and reports to show "no taxation of churches" has been the position of our courts.

History relates that the minds of our Founding Fathers was to promote churches and their schools. Land has been granted to them for the purpose of building schools. Religion, morality, and knowledge necessary to good government and the happiness of mankind is spread through many of the early documents such as the "Northwest Ordinance"of 1787.

When I was ordained to the Gospel ministry 21 years ago, the Social Security laws required that I sign a waiver <u>if I chose</u> to pay Social Security taxes. I believe that was a fair law. Until the Social Security Tax reform law of 1983, that was still true of a minister or the church staff.

When we started our church school ministry in 1976, we called the IRS office in Des Moines, Iowa, and asked about the possibility of our teachers being under Social Security. We were told that was impossible unless the church signed a waiver because the government could not tax a church.

I have no quarrel with any minister or church who voluntarily chooses to pay Social Security taxes.

I believe a satisfactory solution, honoring to both God and our country, would be to allow ordained ministers and church staff (assistants, teachers, secretaries, custodians, etc.) to choose Social Security if they so desire, and pay the Social Security taxes as a self-employed person does now. That would give everyone the opportunity for Social Security coverage, but would not change the historic position of our government abstaining from taxing churches.

I urge this Committee to recommend to the appropriate bodies that churches be removed from the list of organizations to be taxed for Social Security on January 1, 1984.

Olen R. Adams
Pastor
Quint City Baptist Temple
4823 Jersey Ridge Road
Davenport, Iowa

STATEMENT OF DR. GREG DIXON, PASTOR, INDIANAPOLIS BAPTIST TEMPLE, AND NATIONAL CHAIRMAN, AMERICAN COALITION OF UNREGISTERED CHURCHES, INDIANAPOLIS, IND.

Dr. DIXON. Thank you, Senator Dole. I am a native Kansan, a transplanted Hoosier, and it is a pleasure to be here today. Thank you, sir.

Make no mistake about it, D-Day for the churches of America is January 1, 1984. Maybe Orwell had the right date after all. On this date, every church in America must register and pay taxes to the Federal Government. Please remember that this has never happened since the founding of our Nation more than 200 years ago.

Originally, when this issue arose in Congress in 1934, the legislators suggested that it be voluntary. In fact, Congress was very emphatic. They said, "We can't tax God."

In 1951, however, Congress decided that God could be taxed voluntarily. Many churches since then have opted in, and some who did participate have opted out. Many never were included.

However, in 1984, 50 years later, Congress has decided that God can be taxed, even involuntarily. This issue strikes at the very core of the separation of church and state. What can join the church and state more than coercive taxes?

The principle of this division is found in the dawn of history, as is recorded in Genesis, chapter 14, where Abraham refused to take that which the King of Sodom offered him and yet paid tithes to Melchisedec.

The church is not to finance the government; neither is the government to finance the church. A state-financed church is a state-controlled church. The pulpit must ever be free to cry out against the king. Ezra said, "Also we certify you that touching any of the priests and Levites, singers, porters, nethonyms, or ministers of this house of God, it shall not be lawful to impose toll, tribute, or custom upon them."

The New Testament is equally clear. Countless verses of scripture point out the fact that Christ is the head of his church. Paul compares the special relationship of Christ and his church to a man and his wife. What can be closer? Christ is the savior of the body, not the state. The Church is subject unto Christ, not the state. The state can give nothing for the church and should give nothing to the church. The Lord nourishes and cherishes the church.

Through the centuries the state has tried to destroy the church. The church is a living organism with a living head and a body.

I say that the issue prior to the founding of this Nation was simply this: Religious taxation was the main issue.

Who can deny that January 1, 1984, every church in America will be required to become a state church. A state church is a church that is recognized by the state, serves the state, provides revenue for the state, and serves a public purpose that is not contrary to established public policy, and this is exactly what was decreed for the churches of America.

I did some research in calling some mission boards before I came here today. These people are in contact with missionaries all over

the world. It is interesting that I could not find one nation on earth today that imposes taxes upon churches.

I have just come back, also, from Nebraska, where seven fathers are in jail. A pastor and his daughter, and seven wives, and 23 children. The pastor and his daughter and the wives are literally fugitives from that state's law enforcement officers. They will be here in Washington later today to see the pastor banished from the pulpit.

I was there, on October 18, 1982, when sheriff's deputies, backed up by the State Police of Nebraska, came in and literally picked us up out of a prayer meeting and drug us out of the church for the first time since the founding of America.

I have seen the long arm of tyranny there, where we are only talking about local officials. May I say that if this is passed, I represent approximately 5,000 churches, and we may be experiencing the same thing, except by Federal Marshalls. We may be imprisoned, our church property confiscated. I don't think any of us want that—not here in America.

Thank you, sir.

The CHAIRMAN. We don't want that, either.

Rev. Charles Bergstrom.

(A booklet by Dr. Greg Dixon follows:]

THE FICA ISSUE

AND

CONTROL OF CHURCHES

by Dr. Greg Dixon

National Chairman of the American Coalition

of

Unregistered Churches

Make no mistake about it; "D" day for the churches of America is January 1, 1984. Maybe Orwell had the right date after all. On this date every church in America must register and pay taxes to the Federal Government. Please remember that this has never happened since the founding of our nation more than two-hundred years ago.

Starting January 1, 1984, all churches and schools, which are exempt from federal income tax under section 501 (c) (3) of the Internal Revenue Code, will be required to pay FICA (Federal Insurance Contributions Act) taxes for each employee who is paid $100.00 or more in a calendar year.

Be assured, regardless of what it is called; this is a tax. President Franklin D. Roosevelt said that it was a tax when it was presented to Congress originally in 1934. Congress admitted that it was a tax when it was passed. The Supreme Court since has declared it to be a tax, and the two greatest Constitutional attorneys of our times in the area of religious liberty have said that this is a tax. David Gibbs has said it over and over again on the A.C.E. fall tour. Mr. William Ball has said essentially the same thing in a memorandum from his office.

> Mr. Ball says: "The principle involved is plainly a tax on religion. Churches and religious schools are not afforded an option to pay, or not to pay, for an insurance program for their employees. The relatively small size of the tax is irrelevant (though to some the burden may be substantial). If religion may be taxed a little, why not greatly? The tax imposes obligations upon religious bodies in respect to the use and management of their own resources and with respect to the personnel of their ministries."

This position paper should not be interpreted as advising anyone as to what he should do in regards to this tax. Neither should it be perceived as an encouragement to anyone to break the law by non-compliance. This paper is for the purpose of clarifying the issues and suggesting some alternatives. It also explains what some churches are doing in regards to this problem.

To get a proper perspective, let us review the social security issue. Mr. Ball writes: In January, 1984, non-profit

organizations, including churches and Christian schools, will be swept into social security: Earlier this year Congress passed HR 1900 which was heralded as the 75 year cure of the nation's sagging social security program. President Reagan has signed the bill into law. Beginning January 1, Christian schools will be required to withhold 6.7% from each employee's salary for social security payments. The Christian school (and/or church) will, in addition, pay 7% of each employee's salary to social security as well. Understandably, this will have a significant financial impact on many Christian schools that have not participated in the government's social security program."

Of course, many churches would have to borrow money to pay these taxes since most of them do not have it in their budget.

Originally when this issue arose in Congress in 1934, the legislators suggested that it be voluntary for everyone. President Roosevelt said, "No." In fact, he said that it would be an "involuntary coercive tax." Many of the "old line" churches asked to be included. Congress was very emphatic. They said, "No, we can't tax God." So they didn't.

In 1951, however, Congress decided that God could be taxed voluntarily. Many churches since then have "opted in and some who did participate have "opted out" and many never were included. Now in 1984, fifty years later, Congress has decided that God can be taxed even involuntarily.

Make no mistake about it; the penalties are unbelievably stiff. The pastor or responsible officer could receive a five year prison term or a $10,000.00 fine or both and this is just on one count.

According to Dr. David Gibbs, there are three principles involved in this matter of taxation. First, the power to tax is the power to control. Secondly, this tax (FICA) is the means by which government provides benefits (subsidy or welfare) and thirdly, a tax is a text of sovereignty. One state cannot tax another because each is sovereign, God is sovereign; He cannot be taxed.

Many pastors are asking if a church has the scriptural

right to refuse to pay taxes. This issue strikes at the very core of the separation of church and state. What can join the church and state more than coercive taxes?

The principle of this division is found in the dawn of history as it is recorded in Genesis chapter 14. Abram paid tithes of all to Melchizedek, King of Salem, and refused the spoils of war offered (though legally) from the King of Sodom. It is clear that it was the result of a solemn oath that Abram had made to God. "Abram said to the King of sodom, I have lift up mine hand unto the Lord, the most high God, the possessor of heaven and earth, that I will not take from a thread even to a shoe latchet, and that I will not take anything that is thine, lest thou shouldst say, I have made Abram rich." Genesis 14:22,23. Maybe the church of the Lord Jesus Christ should restate this vow again.

The church is not to finance the government, neither is the government to finance the church. A state-financed church is a state controlled church. The pulpit must ever be free to cry out against the king. Nathan said to King David, "Thou are the man." 2 Samuel 12:7. Later, as religious freedom began to die in Israel, prophets were imprisoned or killed for such boldness.

We also see that the Levites were not taxed or conscripted for military purpose. Numbers 1:45-54; Numbers chapter 18. Note especially verse 24. The tithe was to go the the Levites, Deuteronomy 14:27-29; Joshua chapter 21. However, I think Ezra 7:24 is as clear as crystal. "Also we certify you, that touching any of the priests and Levites, singers, porters, Nethinims, or ministers of this house of God, it shall not be lawful to impose toll, tribute, or custom, upon them."

The New Testament is equally clear. Matthew 28:18-20; Ephesians 5:21-33. Let's look at some principles in these verses.

1. The Lord Jesus Christ is the sole authority over the church. Matthew 28:18.
2. The church is under order from Him alone to disciple, baptize, and teach all things that He has commanded them. Verses 19,20.

3. If the church will do this then He promises to be with her to the end. Verse 20
4. Paul compares the special relationship of Christ and His church to a man and his wife. What can be closer. Ephesians 5:21-33.
5. Christ is the Saviour of the body (the church), not the state. Verse 23.
6. The church is subject unto Christ, not the state. Verse 24.
7. Christ purchases the church with His own blood. Verse 25. The state can give nothing for the church and should give nothing to the church.
8. The Lord nourishes and cherishes the church. Through the centuries the state has tried to destroy the church.
9. The church is a living organism with a living head and body. Therefore the church is not a religious organization. It is possible to be a religious or charitable organization without being a church.
10. The church is to be joined unto Christ, verse 31. The Lord Jesus uses the word "cleave" in Matthew 19:5
11. Admittedly this is a great mystery, verse 32, and in this post-Christian era it should not surprise us if a world who hated our Lord Jesus Christ should also hate His church.

The following is taken from:

BAPTISTS AND THE AMERICAN TRADITION!

by Robert C. Newman
Regular Baptist Press
Des Plaines, Illinois

"Pressures upon the New England Bible commonwealth forced gradual changes in their peculiar form of church-state union. Civil magistrates continued to enforce both "tables of the law," which meant the regulations of the religious as

well as the civil life of the populace. The magistrates were considered the "nursing fathers to the church," and as such, they could pass and enforce legislation for tax support of Congregationalism. They could not alter the church's beliefs and worship, a hated memory of the old days in England. But taxation for church support and the trial of heretics were within their domain. Not until 1728 did Puritan New England exempt Baptists, Anglicans and Quakers from taxation for support of the "Standing Order." Page 24, paragraph 1.

"In the same year the supporters of the established order came out with a tax to complete the parish meeting house. Backus and the Separates were duly billed. He refused to pay his share which was five pounds. For this he was threatened with jail. A friend paid the sum and the authorities let Backus go. Others in the church were less fortunate. Several had their goods sold at auction and one woman remained in jail for thirteen months. The die was cast. Such persecution made Backus determined to fight the system to the end. He began to develop a theory of church-state separation with far-flung consequences." Page 20, paragraph 1.

"Being a strong Baptist and an independent, he (Backus) took care to ascertain beforehand whether or not the Association woiuld wield any control over his local congregation." Page 33, paragraph 3.

"Religious taxation was the main issue. Backus was the alert leader in this long controversy. He resorted to newspaper attacks against the proposed constitution for its failure to eliminate taxation to support congregationalism."

"Backus was a man of principle. He did not simply contest tax support for the established church, but tax support of any religious body." Page 35, paragraph.

1 & 2.

"In the pamphlet he (Backus) describes punishments, imprisonments and other assorted persecutions directed at various Separates and Separate-Baptists on the part of the New England oligarchy." Page 36, paragraph 2.

"In 1783 he (Backus) wrote A Door Opened for Christian Liberty. In it he related the persecution of Richard Lee." Page 36, paragraph 3.

"...he (Backus) argued that the Head of the Church is Christ and, since there is no earthly head, then to impose one is unbiblical. ...since the above is true, then a government should not govern in religious affairs. ...he (Backus) maintained that the 'end of civil government is the good of the governed.' Page 37, paragraph 1. The established clergy held sole right to perform marriages and bury the dead. ...Thus, while Anglican ministers were state supported, they were also state regulated. Beginning in 1662 and continuing for nearly a century afterward, Virginia's General Assembly required ministers to present evidence of ordination by an English bishop." Page 40, paragraph 2.

"The Baptists were the first to enter the war for religious liberty in Virginia." Page 42, last paragraph.

"They (the New Light Baptists) were often without formal training and always without government sanction. ...Between 1768 and 1776 the colony imprisoned more than forty Baptist preachers. This was relatively easy since they had no state certification." Page 42, paragraph 3.

In the Fundamentalist vs. Modernist controversy in the 20's the issue was, "Who is Jesus?" The controversy today is, "What is the Church?"

The true church of the Lord Jesus Christ should not be surprised if one of it's greatest antagonists in this struggle are the interdenominationalists and para-church organizations.

They believe in a universal, invisible church while the Bible teaches that His assembly is local and visible.

Who can deny that January 1, 1984, every church in America will be required to become a state church. According to Dr. Robert McCurry in the August 14, 1983 issue of The Temple Times.

> "A state church is a church that is recognized by the state, serves the state, provides revenue for the state, and serves a public purpose that is not contrary to established public policy. This is exactly what was decreed for the churches of America.
>
> Churches will be registered with the state by tax-identification numbers.
>
> Churches will be producers of revenue for the state by paying taxes 'to assure the solvency of the Social Security Trust Funds.' Taxable organizations are answerable to the government - open to the inspection and dictates of the government.
>
> Churches will be agents of the state by confiscating and remitting to the state taxes that the state has ordered the church to confiscate from the remuneration of church employees.
>
> Churches will be servants of the state by keeping records for and remitting records to the state.
>
> Of course, this is just the beginning. The full impact of what will be imposed on the churches is yet to be seen. Once a state church has been decreed, the door is open to an endless number of impositions."

Mr. Alan Crapo, a Christian attorney in Indianapolis, has compiled a list of forty-one different areas of conflict between the church and state today (available upon request). No wonder over 6,000 Christians and churches are on trial

in America today. In a recent court trial a pastor was asked by a prosecutor if his church used toilet paper. When the obvious had been established the state tried to enforce interstate commerce laws against the church when it was showed that they had brought the paper over state lines.

No same person would argue that there can be total separation between two immovable objects such as the state and the church. We have never refused to comply to reasonable suggestions in regards to health and safety.

WHAT CAN BE DONE?

I am suggesting that churches become unincorporated, both state and federal; and that new churches not apply at all. In my opinion after studying this subject for many months, incorporation is possibly the innocent trap that Satan has lured us into.

Make no mistake about it, a corporation is no fictitious entity. It is a creature of the state. It has no Constitutional rights as the individual, and it must make incredible concessions today which are clearly unscriptural.

Consider what the Supreme Court of 1905 had to say in regards to incorporation in the Hale vs. Hinkle case.

Quote: "The benefits of the 5th amendment are exclusively for a witness compelled to testify against himself in a criminal case and he cannot set them up on behalf of a corporation."

Quote: "A corporation is a creature of the state and there is a reserved right in the legislature to investigate its contracts and to find out whether it has exceeded its power."

Quote: "There is a clear distinction between an individual and a corporation and the later being a creature of the state has no constitutional right to refuse to submit it's books and papers for an examination

at the suit of the state."

Quote: "Franchises of the corporation chartered by the state are, so far as they involve questions of interstate commerce, ("Denominations") excercised in subordination of the power of congress may not have general visitorial power over state corporations, its power in indication of its own law are the same as if the corporation had been created by an act of congress."

When our forefathers signed the Declaration of Independence they also declared themselves to be dependent on Divine Providence. Those men knew that if God did not help them that they would be destroyed.

Is it not time for the blood bought church of Jesus Christ to cast herself on her Heavenly Bridegroom who is the Provider and Protector of the church, "The Saviour of the Body."

STATEMENT OF REV. CHARLES BERGSTROM, EXECUTIVE DIRECTOR, OFFICE OF GOVERNMENTAL AFFAIRS, LUTHERAN COUNCIL U.S.A., WASHINGTON, D.C.

Reverend BERGSTROM. Yes, Mr. Dole.

I want to thank you, also, for the opportunity of being here, and reiterate what is in the printed material which will become a part of the record, that my office represents approximately 11,000 Lutheran congregations across this Nation.

The employees of most of our Lutheran churches have for many years benefited from social security coverage. The contribution which has been levied on their earnings and that of the covered employees has never been interpreted by Lutheran churches to constitute a violation of religious liberty.

The social security system has gone very far, we feel, in insuring that people in their old age and in other serious circumstances can achieve at least a minimum standard of living, and this is a proper concern both of government and of the church.

Thus, for well over a decade the Lutheran council has advocated that social insurance programs should be strengthened and extended, with respect to persons who are not now included and with respect to the benefits that might be paid. We feel employees of churches should be granted the protection, the benefits, and the guaranties that the laws of the State assure to all employees of nonprofit organizations.

Churches should not be exempt from policies such as wages and hours provisions, health, and safety standards, retirement coverage, or similar laws designed to protect persons in that church service.

I would like to say that in 1979 the Lutheran churches conducted a consultation on church and government. We defined that relationship, Mr. Dole, as "interaction." A "wall of separation" is not really a description, when you think about our military chaplains wearing the uniform of the United States and serving, and yet being ordained clergy of various religions.

We believe that the church has the right to define its ministry, and that the government has the right to regulate. And that that wall needs at times to be looked at as a "zone" where there can be interaction for the good of people.

We also believe that God is in government. The church does stupid things the same as government does, because it is made up of human beings. It makes mistakes in judgment, and it differs, one from the other.

Therefore, we would like to say, in terms of our theological position, that we are not Israel of the Old Testament; we are the United States, a democracy, a pluralistic society.

In our history, we have had differences with the Federal Government. The integrated auxiliary issue is an area where we feel that Government has tried to define the ministry of the church, and the Internal Revenue Service continues that kind of struggle with us. Many church groups are involved in that. We object strenuously to the Office of Management and Budget's effort to rewrite circular A-122 to do things we feel are not necessary and that would begin to limit the ministries of churches and organizations.

So we are not saying that everything the Government does is right, or that we always agree with that.

Also, you face the human factor, to which I have referred. I am also a believer. I have often described myself in similar testimony as "evangelical, born-again, Lutheran Christian," and I happen to differ with others who are on the panel today about how Christians would interpret how Government and church interact and carry out their work. Every Lutheran considers him or herself to be an evangelical Christian.

The State of Nebraska has been mentioned twice in previous testimony. In that particular case, I am not sure that the Government of that State acted wisely and well in carrying out its laws; but the Lutheran Church in America firmly supported the right of the State to define those kinds of decisions which should be made about accreditation for teachers. So they differed on that particular issue.

There is a history of objection. There are times when some denominations, some church groups and individuals object to any of the kind of activities discussed here. I agree with Mr. Robert Meyers, who would feel that if that long history of objection is there, those exemptions can certainly be taken into consideration.

So, on behalf of three churches, I would like to conclude by saying that, as Lutherans—the ones that I represent in this particular testimony, the American Lutheran Church and the Association of Evangelical Lutheran Churches, and the Lutheran Church in America—we were aware of the provision that recently was passed as a Social Security package, that which would extend coverage to all nonprofits. We did not oppose this measure when it came to Congress for a vote, and we do not oppose it now.

Thank you, sir.
The CHAIRMAN. Thank you very much.
[Reverend Bergstrom's prepared statement follows:]

LUTHERAN COUNCIL IN THE USA

122 C Street NW
Suite 300
Washington DC 20001
202/783-7501

SUMMARY

Testimony on S2099

My name is Charles V. Bergstrom, Executive Director of the Lutheran Council's Office for Governmental Affairs. The American Lutheran Church, the Lutheran Church in America and the Association of Evangelical Lutheran Churches participate in this office.

Employees of most Lutheran churches have for years benefitted from Social Security coverage. The contribution levied on earnings of covered employees has not been interpreted by Lutheran churches to constitute the violation of religious liberty that a more direct tax on the church would create.

The Social Security system has gone far in ensuring that people in their old age or in other serious circumstances can achieve at least a minimum standard of living--a proper concern of both government and church. Thus, for well over a decade the Lutheran Council has advocated that social insurance programs should be strengthened and extended with respect to persons not now included and with respect to benefits paid. Employees of churches should be granted the protection, benefits and guarantees the laws of the state assure to all employees of non-profit organizations. Churches should not be exempt from such policies as wages and hours provisions, health and safety standards, retirement coverage, or similar laws designed to protect persons in their service. (From "The Church as Employer," American Lutheran Church, 1968.)

LUTHERAN COUNCIL IN THE USA

122 C Street NW
Suite 300
Washington DC 20001
202/783-7501

Statement of Charles V. Bergstrom
Executive Director
Office for Governmental Affairs
Lutheran Council in the U.S.A.

on

Mandatory Social Security Coverage for
Employees of Religious Organizations
and
S2099

I appreciate the opportunity to comment on the general issue of Social Security coverage for employees of religious organizations and S2099, which would delay for two years the coverage made mandatory in the recently-passed Social Security package.

The following churches participate in the Office for Governmental Affairs:

The American Lutheran Church, headquartered in Minneapolis, Minnesota, composed of 4,900 congregations having approximately 2.4 million United States members;

The Lutheran Church in America, headquartered in New York, New York, composed of 5,800 congregations having approximately 2.9 million members in the United States; and

The Association of Evangelical Lutheran Churches, headquartered in St. Louis, Missouri, composed of 270 congregations having approximately 110,000 United States members.

These Lutheran churches carefully scrutinize government activities in the areas where church and state interact--and strongly oppose actions of the federal government which would infringe upon the rights guaranteed to churches under the First Amendment. They have worked in strong solidarity with members of the voluntary sector--both religious and secular--to promote federal policies which strengthen the viability of that sector and to oppose government policies and practices which create impediments to the effective operation of non-profit organizations. There are currently areas where we see serious government attempts to limit the rights of churches and other non-profit groups. Among the areas of serious church-state concern are attempts by the Internal Revenue Service to define what activities are "religious" through its definition of "integrated auxiliaries" of churches and the misguided efforts of the Office of Management and Budget to restrict the advocacy activities of churches and other non-profits through various revisions of Circular A-122.

However, the extension of mandatory coverage of Social Security to employees of all non-profits is just not an area where we see unwarranted government intrusion into church activities.

Our view on this issue is colored by our theological understanding of what we believe to be the proper relationship between church and state as each carries out its God-given role. We firmly support the institutional separation of church and government. The church must be free to carry out its mission without government interference--and it is our understanding of that concept which is the basis for our resistance to the government actions mentioned above. But because we recognize the positive role of government, we can support functional interaction between church and government which assists in the maintenance of good order, the protection and extension of civil rights, the establishment of social justice and equality of opportunity, the promotion of the general welfare, and the advancement of the dignity of all persons. Church and government can and should work together to enhance the common good--and supporting the social security system is one area where such support benefits individual persons working for the church and society as a whole.

That is in no way to say that Social Security is per se mandated by God! But it is to say that, given our particular historical circumstances, we believe the system has gone far in ensuring that people in old age or in other serious circumstances can achieve at least a minimum standard of living--a proper concern of both government and church. Thus, for well over a decade it has been the position of the Lutheran Council that social insurance programs should be strengthened and extended with respect to persons not now included and with respect to benefits paid.

Most employees of Lutheran churches and agencies have for years come under Social Security; the contribution levied on the earnings of covered employees has not been perceived by Lutheran churches to constitute the violation of religious liberty that a more direct tax on the church would create.

The responsibility of the church to provide adequately for all its employees--whether pastors, secretaries, or janitors--is clearly articulated in a statement on "The Church As Employer" approved as a guide by the 1968 General Convention of the American Lutheran Church.

In affirming that the church should never be guilty of exploiting the good will or consecration of the people it employs, the statement asserts:

> "Employees of the church have a right to expect from their salary paying organization the protection, benefits, and guarantees the laws of the state assure to all employees and to volunteers in the service of voluntary, not-for-profit organizations. Churches should not be exempt from wages and hours provisions, health and safety standards, workmen's compensation and disability protections, unemployment and retirement coverage, liability protection, or similar laws designed to protect persons in their service."

About a year ago, prior to the passage of the social security package, a number of our Lutheran Social Service agencies in the upper mid-West were considering opting out of social security as a money-saving move. One of the larger agencies did an in-depth study of what opting out of the system would mean to the agency as a whole and what alternatives were available to provide protection for employees--career social workers and pastors as well as support staff. Those higher on the "career ladder" had other options available to them--options that were in reality not open to, say, janitors in our agencies. Among other reasons, the desire to provide for all workers at least a minimum coverage not lost if they should move to different employment led that agency to stay in the system. When that report was shared with other affiliated Lutheran Social Service agencies, none decided to get out of the system.

The Lutheran Churches I represent were fully aware of the provision in the recently passed Social Security package which would extend coverage to all non-profits; they did not oppose this measure when it came to Congress for a vote--and they do not oppose it now.

THE NATURE OF THE CHURCH AND ITS RELATIONSHIP WITH GOVERNMENT

A statement with public policy recommendations on church-state issues adopted by the Lutheran Council in the U.S.A.

A. INTRODUCTION

An increasingly complex society has produced growing interdependence and interaction among groups, persons, and resources in the governmental, economic, and voluntary sectors. The government's responsibilities to maintain equity and order have led both the churches and the state into greater contact and, at times, into tension. As governmental bodies seek to perform their roles and the churches seek to fulfill their missions, each needs to be aware of the other's purposes, principles, and methods. In their endeavors, both the churches and the government have the task of formulating and clarifying position statements and guidelines for implementation and application when appropriate.

The Lutheran Council in the USA, a cooperative agency of The American Lutheran Church, Association of Evangelical Lutheran Churches, Lutheran Church in America, and Lutheran Church–Missouri Synod, is aware of rising concern within its participating bodies over governmental activity in matters affecting the churches and their ministries. There are instances in which laws, rulings, and regulatory procedures on the part of government appear to infringe upon the churches and their agencies and institutions. Governmental efforts to define the nature, mission, ministries, and structure of religious organizations are likely to continue. These developments have raised questions within the Lutheran churches about the right and competence of government to define the nature, mission, ministries, and structure of religious bodies.

The Lutheran Council recognizes that an ongoing process of communication within the Lutheran family of churches and with other religious bodies and organizations in the voluntary sector is proper and timely as response is given to the government. Government officials need to be informed about the positions and perspectives of the Lutheran churches.

On these grounds the Lutheran Council convened a consultation on church-state issues which resulted in the following statement and recommendations. The report of the consultation was adopted by the council's 1979 annual meeting on May 16 in Minneapolis.

B. STATEMENT OF AFFIRMATION

1. Church and Government in God's World

God's omnipotent activity in creation is dynamic; that is, it is living, active, and powerful in all human affairs. The structure and polities of civil and Christian communities are determined and arranged by tradition, circumstances, and needs.

Lutherans acknowledge the twofold reign of God, under which Christians live simultaneously. God is ruler of both the world and the church. The church is primarily the agency of the Gospel in the new age of Christ, while the state is primarily the agency of the Law in the old age of Adam.

Given the balance of interests and differing responsibilities of the churches and the government in God's world,-the Lutheran churches advocate a relationship between the churches and the government which may be expressed as "institutional separation and functional interaction."

Both the churches and the government are to delineate and describe the proper and responsible extent of their functional interaction in the context of God's rule and the institutional separation of church and state.

2. Institutional Separation

In affirming the principle of separation of church and state, Lutherans in the United States respectfully acknowledge and support the tradition that the churches and the government are to be separate in structure. As the U.S. Constitution provides, government neither establishes nor favors any religion. It also safeguards the rights of all persons and groups in society to the free exercise of their religious beliefs, worship, practices, and organizational arrangements within the laws of morality, human rights, and property. The government is to make no decisions regarding the validity or orthodoxy of any doctrine, recognizing that it is the province of religious groups to state their doctrines, determine their polities, train their leaders, conduct worship, and carry on their mission and ministries without undue interference from or entanglement with government.

a. The Church's Mission

1) The central mission of the church is the proclamation of the Gospel; that is, "the good news" or promise of God that all persons are forgiven by and reconciled with God and one another by grace through faith in Jesus Christ.

2) The church is the fellowship of such forgiven and reconciled persons united in Jesus Christ and guided by the Holy Spirit to be sons and daughters of the Father. In and through that fellowship Christians express their love for, confidence in, and reliance upon God through worship, education, social action, and service.

3) The church is also the people of God called and sent to minister under his authority in his world. God also calls the church to be a creative critic of the social order, an advocate for the needy and distressed, a pioneer in developing and improving services through which care is offered and human dignity is enhanced, and a supportive voice for the establishment and maintenance of good order, justice, and concord. Another mark of the presence of the church in the world is in its ministries involving activities, agencies, and institutions through which the church and society seek to fulfill their goals in mutual respect and cooperation.

4) Lutherans hold that their churches have the responsibility to describe and clarify to their members and to society the mission of the Lutheran churches and to determine, establish, maintain, and alter the various forms through which that mission is expressed and structured.

5) The distinctive mission of the churches includes the proclamation of God's Word in worship, in public preaching, in teaching, in administration of the sacraments, in evangelism, in educational ministries, in social service ministries, and in being advocates of justice for participants in the social order.

6) On the basis of their commitment to him who is both Lord of the church and Lord of the world, Lutheran churches establish, support, operate, and hold accountable their congregations, agencies, institutions, schools, organizations and other appropriate bodies.

7) While church bodies have differing polities, it is fitting to describe them, including their duly constituted agencies, according to their ecclesiastically recognized functions and activities.

8) Lutheran churches have the authority, prerogative, and responsibility to determine and designate persons to be professional church workers, both clergy and lay; to establish criteria for entrance into and continuance in the functions carried on by professional church workers; to create educational institutions for training professional church workers; and to provide for the spiritual, professional, and material support of such persons. Such support extends throughout the preparation for, activity in, and retirement from service in the several ministries of the churches.

9) Lutheran churches have the authority and prerogative to enter into relationships, associations, and organizations with one another; with overseas Lutheran churches and bodies; with other Christian fellowships or other religious groups on regional, national, and international levels; and with voluntary or governmental agencies which the Lutheran churches and other groups deem helpful and fitting to their respective purposes.

b. The Government's Role

1) According to Lutheran theology, the civil government's distinctive calling by God is to maintain peace, to establish justice, to protect and advance human rights, and to promote the general welfare of all persons.

2) As one of God's agents, government has the authority and power in the secular dimensions of life to ensure that individuals and groups, including religious communities and their agencies, adhere to the civil law. The churches and their agencies in the United States are often subject to the same legislative, judicial, and administrative provisions which affect other groups in society. When necessary to assure free exercise of religion, however, Lutheran churches claim treatment or consideration by government different from that granted to voluntary, benevolent, eleemosynary, and educational nonprofit organizations in society.

3) Government enters into relationships, associations, and organizational arrangements with nongovernmental groups, including churches, according to the nation's laws and traditions, in order to fulfill its God-given calling and without compromising or inhibiting the integrity of either the groups or the government.

4) Government exceeds its authority when it defines, determines or otherwise influences the churches' decisions concerning their nature, mission, and ministries, doctrines, worship and other responses to God, except when such decisions by the churches would violate the laws of morality and property or infringe on human rights.

3. Functional Interaction

Lutherans in the United States affirm the principle of functional interaction between the government and religious bodies in areas of mutual endeavor, so that such interaction assists in the maintenance of good order, the protection and extension of civil rights, the establishment of social justice and equality of opportunity, the promotion of the general welfare, and the advancement of the dignity of all persons. This principle underscores the Lutheran view that God rules both the civil and spiritual dimensions of life, making it appropriate for the government and the churches to relate creatively and responsibly to each other.

In this functional interaction, the government may conclude that efforts and programs of the churches provide services of broad social benefit. In such instances and within the limits of the law, the government may offer and the churches may accept various forms of assistance to furnish the services. Functional interaction also includes the role of the churches in informing persons about, advocating for, and speaking publicly on issues and proposals related to social justice and human rights. From the Lutheran perspective, the church has the task of addressing God's Word to its own activities and to government. The U.S. Constitution guarantees the right of the churches to communicate concerns to the public and to the government.

a. The Church's Responsible Cooperation with the Government

1) The church relates to the interests of the state by offering intercessory prayers on its behalf. Christians are called to offer supplications and thanksgiving for all persons, especially "for kings and all who are in high positions" (1 Timothy 2:1).

2) The church relates to the interests of the state by encouraging responsible citizenship and government service. The church has always admonished its members to be "subject to the governing authorities" (Romans 13:1) out of respect for the civil power ordained by God.

3) The church relates to the interests of the state by holding it accountable to the sovereign law of God, in order to provide judgment and guidance for those leaders responsible under God for the peace, justice, and freedom of the world.

4) The church relates to the interests of the state by contributing to the civil consensus which supports it. Especially under the U.S. system, which provides for wide participation, the church has the responsibility to help create a moral base and legal climate in which just solutions to vexing political problems can take place.

5) The church relates to the interests of the state by championing the human and civil rights of all its citizens. Christians believe that under God the state exists for people, not people for the state. In addition, the church may volunteer its resources as a channel for meeting the needs of society through cooperation with government.

b. The Government's Responsible Cooperation with the Church

1) The state relates to the interests of the church by ensuring religious liberty for all.

2) The state relates to the interests of the church by acknowledging that human rights are not the creation of the state.

3) The state relates to the interests of the church by maintaining an attitude of "wholesome neutrality" toward church bodies in the context of the religious pluralism of our culture.

4) The state relates to the interests of the church by providing incidental benefits on a nonpreferential basis in recognition of the church's civil services which are also of secular benefit to the community.

5) The state relates to the interests of the church by providing funding on a nonpreferential basis to church agencies engaged in the performance of educational or social services which are also of secular benefit to the community.

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C. PUBLIC POLICY RECOMMENDATIONS

The foregoing "Statement of Affirmation," prepared by the Lutheran Council's Consultation on the Nature of the Church and Its Relationship with Government, speaks in broad terms about a Lutheran understanding of the appropriate relationship between church and government, under God, which has been described in terms of "institutional separation and functional interaction."

The consultation applied this understanding to a number of concrete issues presently confronting Lutheran churches, their agencies and institutions in their relationship with government. The following recommendations, which deal with current issues, illustrate ways our churches can address future issues and should be understood as relating to the "Statement of Affirmation."

1. Religious Liberty

We affirm in principle the civil right of the free exercise of religion by a wide variety of groups in our pluralistic culture. We acknowledge that the constitutional guarantees protecting religious beliefs are absolute. However, we recognize that those guarantees governing religious practices are not absolute. The violation of human rights and the breaking of just laws in the name of religion are deplored by our churches.

Recommended:

That the Lutheran Council encourage the participating churches to oppose any attempt by government to curb religious liberty through criminal and/or administrative measures focused at groups, except in cases posing a grave and immediate threat to the public's health, safety, or welfare.

2. Regulatory Processes

Lutheran churches, together with other churches and voluntary organizations, perceive a trend toward greater governmental intervention and regulation leading to erosion of civil and religious liberties.

Recommended:

That the Lutheran Council urge Congress to review the regulatory processes, to ensure that they afford adequate notice and opportunity to the public to study and respond to proposed regulations and rulings.

3. Integrated Auxiliaries

Prior to 1969 most religious organizations, including churches and their related agencies, were exempted from filing informational returns with the Internal Revenue Service. The Tax Reform Act of 1969, however, stipulated that all organizations exempt from taxation under Section 501 (a) of the Tax Code would henceforth have to file an annual informational Form 990 return—except churches, their "integrated auxiliaries," conventions and associations of churches, the exclusively religious activities of any religious order, and exempt organizations with gross receipts under $5,000 annually. The law involves the reporting of information; no payment of taxes is involved.

The problem for the IRS since 1969 has been to define "integrated auxiliaries," since that term had no legal meaning and no common definition among religious groups. In February 1976 the IRS issued proposed regulations which had the net effect of providing for all churches a single and extremely narrow definition of

religious mission. Protests by a number of religious organizations led to some modifications in the "final" regulations issued in January 1977, but the regulations continue to be restrictive. Explicitly excluded from the definition of "integrated auxiliaries" are church-related hospitals, orphanages, homes for the elderly, colleges, universities, and elementary schools, although elementary and secondary schools are exempt from filing.

The heart of the issue is that the regulation relative to "integrated auxiliaries" seeks to impose on the churches a definition of "religious" and "church" which the churches cannot accept theologically, one which constitutes an unwarranted intrusion by the government into the affairs of the churches. The narrow definition introduces confusion within the churches and their agencies and institutions. Questions are raised in the agencies and their constituencies about whether these ministries are considered to be part of the churches' mission. It also leads the government to attempt other intrusions into the activities of the churches and church-related agencies and institutions, e.g., the Department of Labor's stance in the unemployment insurance tax issue (see section 5, below).

Our churches would probably not object to the disclosure of most of the information required by Form 990 by those agencies and institutions of the church whose ministries appear to have counterparts in the public sphere, if such requirement of disclosure were not predicated upon a denial that those ministries are an integral part of the churches' mission. But the churches object on principle to having any of their ministries, including their agencies and institutions, be treated as "not religious." These agencies and institutions perform ministries which are essential to the churches' mission and must not be put in a different category from the strictly sacerdotal functions of the churches.

Recommended:

- That the Lutheran Council encourage the participating churches to seek statutory change which will recognize the religious character of the churches' ministries through their agencies and institutions;

- That the Lutheran Council encourage the participating churches to urge selected agencies and institutions to initiate a court test of the present IRS definition of "integrated auxiliaries." The intention of such action would be (a) to assure the churches' agencies and institutions that the church bodies continue to consider them an integral part of their mission; (b) to assist Congress in achieving a better understanding of this issue; and (c) to achieve a court ruling restoring the recognition of the integrity of the churches' ministry through their agencies and institutions.

4. IRS and Private School Desegregation

A religious organization, as other organizations otherwise entitled to a tax-exempt status, cannot claim the exempt status and at the same time operate contrary to established public policy on racial nondiscrimination. Withholding or withdrawing of the tax exemption by government must be based on an organization's racially discriminatory policy or practice determined on facts within a framework of due process. Presumptions on general circumstances or external conditions are inadequate for this purpose.

On August 22, 1978, the Internal Revenue Service issued a "Proposed Revenue Procedure on Private Tax-Exempt Schools." The proposal set forth guidelines which would be used by the IRS to determine whether such schools are operated on a racially discriminatory basis and whether they are entitled to tax exemption

under Section 501 (c) (3) of the Internal Revenue Code. On December 5, 1978, the IRS held hearings on the proposed revenue procedure. At that time, Lutheran church bodies presented testimony opposing the proposed procedure. On February 9, 1979, the IRS revised its original proposal. The revised revenue procedure is a reasonable procedure for dealing with racial discrimination by private schools. It may have been unnecessary, but it is not objectionable.

Recommended:

That the Lutheran Council urge the participating churches to support the withholding or withdrawing of the tax-exempt status of organizations which, in fact, have a policy or practice of racial discrimination.

5. Unemployment Insurance Tax

To understand the current issues involving the churches' exemption from unemployment insurance coverage, the following points must be remembered:

First, the statutory exemption from coverage under the unemployment insurance law is based on structure, i.e., "church," "convention or association of churches" and "organization operated primarily for religious purposes." The Department of Labor is trying to qualify this by reading into it a functional test, narrowly tied to worship.

Second, elimination of the exemption would seem to have only a negligible impact on free exercise of religion. The direct effect would be paying a tax. There would be an indirect effect of possibly paying a higher tax (depending on experience rating) based upon discharging employees for what the organization might regard to be misconduct on religious grounds but which the government would decide was not such misconduct.

Both religion clauses of the First Amendment are violated when the government establishes an exemption based on structure and then applies it on the basis of the government's perception of whether an activity is or is not religious or sufficiently religious.

Recommended:

That the Lutheran Council, while not necessarily opposing legislation which would eliminate the churches' exemption from unemployment insurance coverage, encourage the participating churches to oppose efforts by regulatory agencies of government to include the churches in unemployment insurance programs by definitions that appear to be contradictory to existing legislation.

6. Public Funding and Regulation of Church-Related Education and Social Services

Education and social services are the tasks of society as a whole. These are public services. When churches contribute to the fulfillment of these public services, they may accept a measure of public support and a concomitant degree of monitoring by government on behalf of the public. That is, government may provide assistance on a nonpreferential basis in recognition of the public services and benefits provided by church-related educational institutions and by social service agencies and institutions of the churches. In relation to these public services, government regulation of church-related institutions and agencies is not per se objectionable.

Recommended:

- That the Lutheran Council urge the participating churches to object when governmental regulation of church-related educational institutions and social service agencies or institutions violates due process, exceeds statutory authority or infringes on First Amendment guarantees;
- That the Lutheran Council encourage the participating churches to join, when possible, with other members of the voluntary sector in objecting to unreasonable regulations. Only when there is a bona fide constitutional question at stake should the Free Exercise Clause be invoked as the basis for objection to regulation;
- That in order to maximize the access of citizens in our pluralistic society to education and social services from agencies and institutions of their choice the Lutheran Council encourage the further exploration and assessment of all constitutional means of government support for a variety of social and educational services at all levels, whether public, private, or church-related.

7. Specialized Ministries of Clergy

Church and government are presently interacting in two sets of circumstances involving the specialized ministries of the churches' clergy. One has to do with specialization in pastoral counseling and the other with chaplaincies in specialized settings. Both of these ministries are more often conducted apart from and on behalf of congregations than through specific local congregations.

The point of intersection between church and state with respect to specialization in pastoral counseling is where governmental units seek to license or otherwise regulate such ministries. The normal counseling dimension in the work of parish pastors is not a part of the issue.

The points of interaction between church and state with respect to chaplaincies in specialized settings have to do with the right of churches to have adequate access in order to serve persons in such settings, the right of individuals in those settings to have access to the ministries of the churches, and the best way to combine these two rights of access.

Attention is drawn to the statement defining pastoral counseling and suggesting standards for certification and accountability approved by the Lutheran Council's Division of Theological Studies and Department of Specialized Pastoral Care and Clinical Education and by the council itself. Additionally, two studies are currently underway in the DTS in consultation with the DSPCCE: one on state licensure of pastoral counselors and the second on institutional chaplaincies.

Recommended:

- That the Lutheran Council encourage the participating churches to establish standards of approval and accountability for professional pastoral counselors and urge the states to recognize the status of such pastoral counselors;
- That the Lutheran Council urge the participating churches to maintain their right of access to restricted environments (e.g., prisons, hospitals, and the military) in order to serve people in those environments, assert the right of people in such environments to access to the ministry of the church, and assert that these two rights of access are best served when qualified persons are integrated into the total function of that environment.

8. Regulation of Lobbying Activity

Advocacy on behalf of justice is an integral part of our churches' mission. The "substantiality" test as applied to lobbying activity requires that "no substantial part" of the income or activities of any tax-exempt organization may be directed toward "carrying on propaganda, or otherwise attempting to influence legislation" (Section 501 (c) (3) of the Internal Revenue Code). Such a test unfairly penalizes, through the threat of loss of tax exemption, those churches which regard public advocacy as part of their mission. Moreover, the effect of this test is to give preferred status, in violation of the Establishment Clause of the First Amendment, to those churches which do not participate actively in the debate on public policy.

Recommended:

That the Lutheran Council urge the participating churches to resist in principle the "substantiality test" as applied to lobbying activity by the churches.

Regulation of lobbying activity may jeopardize the constitutional rights of freedom of speech and freedom to petition the government for redress of grievances which, in turn, is contrary to the interest of open government and the public's right to be informed on issues. It is the responsibility of those who sponsor legislation that may seriously jeopardize those rights guaranteed under the First Amendment to certify that there is a compelling need for government intervention and regulation.

Lobby disclosure legislation which has been proposed extends its scope beyond those organizations engaged in major and continuing lobbying activity. It would, in fact, lay heavy burdens upon small, nonprofit organizations and thus limit many of the services they render in search of peace, justice, and human rights.

Recommended:

That the Lutheran Council publicize the arguments it has set forth as testimony on March 14, 1979, before the House Subcommittee on Administrative Law and Governmental Relations, Committee on the Judiciary, stating opposition in principle to many of the components of far-reaching lobby disclosure legislation.

Lobby disclosure legislation which includes provisions requiring the reporting of grass-roots lobbying and the disclosure of the names of contributors will substantially restrict the free exercise of religion. Such legislation may well result in intimidation of the churches in carrying out their mission because of the massive record keeping that it would require. Disclosure of names poses a potential threat to those who might be inclined to address specific issues through contributions to the churches. Such legislation could also lead to excessive entanglement of government in the work of the churches.

Recommended:

That the Lutheran Council urge the participating churches to oppose any lobby disclosure legislation which would substantially restrict the free exercise of religion.

The method for enforcing any lobby disclosure requirements is an important issue. Criminal sanctions are inappropriate in that they lead to intimidation of those who would be inclined to address government and thus will have a chilling effect on free speech and the right to petition the government.

Recommended:

That the Lutheran Council recommend that the participating churches continue to oppose criminal sanctions within the context of any present or future lobby disclosure legislation.

9. Fund-Raising Disclosure

Lutherans support in principle the concept of fund-raising disclosure. The members of this consultation gladly endorse voluntary reporting of financial operations by church-related and other charitable organizations and encourage the maintenance of an informed giving public. However, in saying this, we are not endorsing every legislative or administrative effort that may be proposed to implement disclosure.

While aware of legitimate interest in curbing past abuses, we oppose federal legislation and regulation which would encompass the entire charitable community in an effort to reach and expose the activities of a very small number of fraudulent operators who solicit money from the general public.

There is no compelling need for legislation requiring charitable solicitation disclosure, given existing laws. Broad and inclusive legislation in this area would likely lead to an expansion of bureaucracy and could create serious constitutional difficulties.

Recommended:

That the Lutheran Council urge the participating churches to oppose any legislation relating to fund-raising disclosure which leads to an unwarranted expansion of government bureaucracy without a justifying and compelling need, an unwarranted and excessive entanglement by government in the affairs of the church, or an unconstitutional involvement by the government in defining the church, its mission, ministry, or membership.

10. Tax Exemptions and Deductions

Religious organizations receive a number of tax exemptions and deductions under state and federal law. However, not every benefit of exemptions and deductions presently enjoyed is indispensable to the free exercise of religion. Lutherans in the USA must never be willing to subordinate their right to such free exercise of religion in exchange for, or as a condition of, the continuation of all benefits of exemptions and deductions currently in effect.

Recommended:

- That the Lutheran Council lend its support to coordinated efforts to ensure the continuance of all proper tax exemptions and deductions for all organizations in the voluntary sector, including religious organizations, as long as acceptance of these exemptions and deductions does not jeopardize constitutionally protected religious rights and freedoms;
- That the Lutheran Council urge repudiation of the concept that exemptions and deductions for organizations in the voluntary sector are tax expenditures.

11. Enhancing the Importance of Charitable Contributions

Studies have shown that changes in tax forms to simplify filing have had an adverse effect upon charitable giving. To reverse this trend, legislation has been introduced to make the charitable deduction available to all taxpayers, whether they elect the standard deduction or itemize their deductions.

Allowing a separate charitable deduction for all taxpayers whether or not they itemize their other deductions would (a) represent an important incentive to personal giving to voluntary human services, (b) recognize the unique nature of the charitable deduction in contrast with other currently itemized deductions, (c) democratize the charitable deduction's base by extending its use to most middle and low-middle income taxpayers, (d) reverse the current trend toward decreased use of this deduction, and (e) avoid the regulatory and related governmental requirements associated with direct forms of federal assistance.

Under another proposal such a charitable deduction for all taxpayers would be allowed only if the charitable contributions exceed a certain amount or percentage of income (the "floor"). Establishing a "floor" would negate the positive effects of a proposal which permits all taxpayers to deduct gifts to charity on their individual income tax returns.

Recommended:

- That the Lutheran Council continue to support legislation that would allow all taxpayers to take a deduction for their charitable gifts, whether or not they itemize their other deductions;
- That the Lutheran Council inform its participating church bodies and the Congress of the justification and need for such a deduction;
- That the Lutheran Council continue to oppose any new limitations, such as a "floor," on the use of the charitable deduction.

D. IMPLEMENTATION OF CONSULTATION GOALS

For implementation of the goals of the consultation on church-state issues, the following actions were taken by the annual meeting of the Lutheran Council in May 1979:

- Adopted the above report of the consultation as a policy statement for the guidance of the work of the council;
- Authorized the general secretary of the Lutheran Council to have the report and the recommendations as adopted printed and distributed to the church bodies participating in the consultation;
- Authorized the general secretary of the Lutheran Council or his representative to present testimony thereon before committees of the Congress, legislative bodies, and agencies of government as opportunity arises, the precise testimony in each instance being subject to approval by the presidents of the participating church bodies or their appointees;
- Requested the presidents of the four participating church bodies to nominate persons for election by the council to constitute a continuing consultative committee of seven, responsible for studying church-state issues, this committee to meet at least twice a year with the staff of the council's Office for Governmental Affairs;
- Authorized the appointment by the general secretary of the Lutheran Council, in consultation with the executive director of the Office for Governmental Affairs, of a committee of legal consultants, including lawyers drawn from the four participating church bodies, to meet on call of the general secretary for deliberation of legal aspects of church-state issues;
- Authorized the Office for Governmental Affairs in cooperation with the Division of Theological Studies and the Division of Mission and Ministry to hold a follow-up consultation with representatives of other church bodies and others interested in matters considered by the consultation;
- Referred the report and recommendations of the consultation as adopted by the council to the participating bodies for their endorsement in substance.

The CHAIRMAN. I would first like to ask a question of the entire panel. You don't have the same objection the others do, Reverend Bergstrom, but I might ask the other members of the panel if employees of churches were treated similarly to ministers, that is, similarly to the self-employed for purposes of Social Security, would that meet your concerns? If that were the case, there would be no employer share of the tax. In other words, the organization, the church, would not pay a tax; the individual would pay the tax.

Dr. DIXON. Yes. I personally believe that if the church—I have no objection if the church, if their theological belief allows them to participate in the Social Security program. This is America.

I think where our theological belief is in conflict that we should have the privilege of opting out, as we have in the past.

By the way, apparently, from our statistics, not too many churches have chosen to opt out; so we are talking about a very few churches in America and religious organizations.

I believe that if the church chooses to opt out, that those who serve as ministers in that church, regardless of the capacity, should also have the privilege of opting out. I think it should be consistent, in my opinion.

The CHAIRMAN. Reverend Brewer.

Reverend BREWER. Well, I think, as Attorney Ball said, that one angle. We are here really to encourage the Jepsen Amendment to give us time to work on this, because I don't like to see what I have seen in the State of Nebraska for 7 years, because I have been up there because we are a neighboring State. Every time I go up there, my heart is sick about this, and that is not my desire as a pastor, to have problems nor with the Federal Government, certainly.

But because of strong convictions, I have just encouraged you to give time to work this thing out, that we will not have the confrontation that is sure to come with this situation.

Dr. DIXON. May I say that it is not a matter of being able for the church to pay the tax, it is not a matter of being willing; it is just simply that we cannot, because the scripture says that the tithe is the Lord's.

The CHAIRMAN. That is why I am wondering if it would help if the employees—and I am not certain how many employees each of you have or the number of churches you have. I assume it is rather significant if you add up all the employees and all the 5,000 churches. I assume you are talking about thousands of employees. Would it help their interests if they were treated similarly to the self-employed for social security purposes? There are benefits under the program that some people may want when they reach that age.

Dr. DIXON. I make a difference between the church and the individual responsibility to the Government—and I want to make that clear. I was only giving my opinion a moment ago.

In other words, I am not saying that my theology says that individuals should not have a responsibility to the state. Individuals may not like to pay taxes. It might be difficult to find a scripture that says they cannot.

The church, in my theological framework, cannot under any circumstances, because the tithe is the Lord's, and not the Lord's and the IRS's.

The CHAIRMAN. Are there retirement programs for your employees? If they are not covered by Social Security, do you have your own retirement?

Dr. DIXON. Not necessarily. Many churches do. We have, at times, if there is money to put into it, of course. We would like to do far more than what we are doing.

However, most of the 5,000 churches that I represent probably would not have more than an average—besides the pastor, probably not more than two or three employees. We are talking about possibly a custodian and maybe a secretary, or something of that type.

Reverend BERGSTROM. I think there are dangers, Senator, in quoting scripture as applied to the Roman Government at the time of Christ, but I would like to remind all of us that it was Jesus who said that we are to render both to God and to Caesar.

The CHAIRMAN. OK.

Reverend BREWER. Let me state again, we said before that we are not against people paying taxes. In fact, there are those of our churches that have private schools. Our people are paying taxes; we want them to be. They are taxpaying citizens, and they are paying double taxes, really. They are paying school taxes, public Government school taxes, and yet they are also sending their children to private schools. So we are not against the individual paying the tax; but let it be known that there are many churches around the country that have a very strong conviction that they cannot. It is not whether they want to or not, it is because of the conviction that they have in their heart that they cannot.

So this is the thing that we want to try to forestall, a confrontation that we don't want to see happen.

The CHAIRMAN. Right.

I think, just for the record, the Joint Committee on Taxation prepared an application of various taxes to churches. The Federal income tax—the church is not subject to tax but must withhold tax on wages paid to church employees. A tax on unrelated business income, it's taxable. FUDA tax, not subject to tax. Federal excise taxes—manufacturers and retailers of gas, diesel, special motor sporting goods, coal and tires—taxable except for fuels used by an educational organization; a church school, for example.

Airline tickets and freight weigh bills are taxable, telephone is taxable except for services provided in educational organizations such as a church school, distilled spirits—communion wine, I assume, is what that means—taxable. Tobacco—I assume where you have a tobacco shop—it is taxable there. So whatever value that is.

Dr. ADAMS. May I say, sir, that in each of these cases we are looking at choice things, and none of these are mandated. A church can get by without any of these. And in the scripture that the gentleman used here, where Christ says render unto Caesar and unto God, even in that case it was an individual and not the organization which the Lord Jesus Christ had established, and he provided a miracle by which that would be done to keep from offending those. And the same scripture says, "Those of the King did not have to pay it."

Reverend BERGSTROM. That is the danger of scripture. Some you apply to individuals and some to the church, depending on how we want to do it, and that's the danger, sir.

The CHAIRMAN. We have a different problem here. [Laughter.]

I mean, everyone interprets differently sometimes. Maybe that even happens in the churches.

But I would like to include in the record at this point materials distributed by the U.S. Catholic Conference and a group of other Catholic organizations entitled "Why the Church Supports Social Security, an Issue of Social Justice." We will make that a part of the record.

[The material follows:]

Why the Church Supports Social Security

Catholic social teaching calls all of us to work for the general welfare of the entire human family. Every person is made in the image and likeness of God and possesses a fundamental human dignity.

This dignity is protected by a set of basic human rights. Among these rights is the right to a pension and to social insurance for the aged, the widowed, and the disabled.

"It is necessary that governments make efforts to see that insurance systems are made available to the citizens, so that, in case of misfortune or increased family responsibilities, no person will be without the necessary means to maintain a decent standard of living."

Pacem in Terris, #64

"Every person has the right to life, to bodily integrity, and to the means which are suitable for the proper development of life. . . . Therefore, a human being has the right to security in case of sickness, inability to work, widowhood, old age, unemployment. . . ."

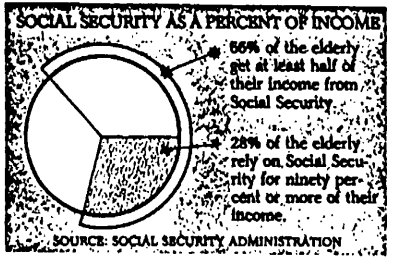
Pacem in Terris, #11

Concern for the Poor

"Defending the human dignity of the poor and their hope for a human future is not a luxury for the Church. . . . It is her duty because it is God who wishes all human beings to live in accordance with the dignity that he bestowed on them."

Pope John Paul II

The Social Security system is one of America's most effective anti-poverty programs. An estimated 11 million persons would fall below the poverty line if they did not receive Social Security benefits.



"Since social security and insurance can help appreciably in distributing national income among citizens according to justice and equity, these systems can be regarded as means whereby imbalances among various classes of citizens are reduced."

Pope John XXIII
Mater et Magistra, # 136

Advantages of Social Security

Social Security provides protection that cannot be duplicated at a comparable cost.

Comprehensive Insurance coverage
- retirement
- disability
- survivors
- health

Protection Against Inflation
- Social Security benefits are increased each year to keep up with inflation

Protection for Dependents
- The range of dependents' benefits under Social Security is broader than under most pension plans

It Moves With You
- Because 90% of all jobs are covered by Social Security, the coverage moves with you from job to job

The Future of Social Security

In recent years the Social Security System has experienced some significant financial difficulties due primarily to problems in the U.S. economy - high unemployment and high inflation. These problems, however, are manageable; and the Congress is expected to address them in ways that assure the ongoing soundness of the system.

While some changes in the program are necessary, it is important to understand that Social Security is ultimately backed by the American government itself. The program will continue to be a reliable source of basic social insurance in our nation.

The CHAIRMAN. Does anyone else have anything to add? I think we understand the thrust of your testimony. Again, I hope you will express to Senator Jepsen our appreciation for his suggested amendment. I am sorry he can't be here, but we have included his statement in the record.

Reverend BREWER. I would like to say just one more thing. We have had a church school for the last 11 years in our church and across the State of Kansas, and we have been to the State house in Topeka several times, concerned about different things. But I want you to know that never have we been there one time with our hands out for tax money. We believe that the church ought to operate on the tithes and offerings of its people.

There may be churches across the country who are looking for that. We are not looking for busing, we are not looking for tax money, we aren't looking for that sort of thing. We believe that the church of Jesus Christ ought to operate without tax dollars.

The CHAIRMAN. Are any of your 3 churches or any of your 5,000 churches voluntarily participating in social security?

Dr. DIXON. Not at this time, to my knowledge. But there are more than that. Probably there are as many as easily 10,000 churches that are not participating at this present time.

Dr. ADAMS. To my knowledge, he is speaking only for a few in the State of Iowa; but I am president of the Iowa Coalition for Christian Liberty, which represents about 400 across the State of Iowa, who would be very strong to the mandating of the social security, voluntarily or on this basis.

The CHAIRMAN. Strongly opposed?

Dr. ADAMS. Who would be strongly opposed to the mandating of the taxing of the churches.

Reverend BERGSTROM. In our larger testimony we do not consider this a tax. I just wanted to underscore that. We see a difference here which is obvious, again, from the other members of the panel.

But I think, also, the history of the church has been very often that we have not provided well for our lay employees, and this would give opportunity to help many of them that has not been done in the past.

The CHAIRMAN. Well, I am not saying what may happen or may not happen. If in fact the employees were treated similarly to the self-employed, then I assume that in your case you would still be willing to pay the employer's share, is that correct?

Reverend BERGSTROM. I would have to check. I am not the legal mind, either; but I don't see any problem with that right now, Senator Dole. I would do it for clergy.

Dr. DIXON. I would very much recommend that anyone who works for a church that does not participate in the social security program be considered self-employed.

The CHAIRMAN. I think the problem we face, having watched the social security system grow, and the dependence on the social security system when people reach the age of 65, is that we want to be very careful about taking people out of the system unless there is a better retirement system provided.

And I know the churches, I assume, would have a great deal of difficulty in many cases in providing a retirement program that would match social security.

Dr. DIXON. Of course, that is an alternate thing that we have talked about. Of course, if something doesn't happen between now and January 1, or if there is not some leeway here, then it is foolish for us to talk about options. But many churches do have a retirement program, through Mutual of New York or other financial institutions. And of course of the two druthers, and I am just speaking of one individual now, I would rather our churches be allowed to have something under a Mutual of New York program or others.

I would personally rather have that than I would even have the employees be classified as self-employed persons.

The CHAIRMAN. Well, I know the January 1 date, but I don't know what is going to happen, because the Congress won't be here until the 23d. Most people consider that good news, but in your case——

[Laughter.]

Dr. ADAMS [continuing]. Could I turn this around, sir, and ask a question of you?

In the consideration of the mandatory social security thing, three questions:

No. 1, as I understood it, the social security system was a voluntary thing in its beginning.

Second, as of last week I called the FICA office in Iowa, and I was told that there is no law that requires any individual to even have a social security number.

So my question is, How can we now from the Government mandate that everyone pay something of which they don't have to belong? Or is our State wrong in that information they gave me?

The CHAIRMAN. I don't believe it was voluntary. We will have sort of the windup of this panel with Mr. Myers, who started with Abe Lincoln——

[Laughter.]

The CHAIRMAN [continuing]. He knows all about social security, and he is going to bring us all up to date on that. It may have been for nonprofits, but I don't think it was voluntary.

We will have Bob Myers with us later. In fact, he is right behind you. You might ask him as you leave. He is that young fellow right behind you there. [Laughter.]

We thank you very much, thank you for coming.

Our next panel is Mr. Richard Dingman, legislative director, Moral Majority; Mr. Forest Montgomery, counsel, office of public affairs, National Association of Evangelicals; Mr. Jack Clayton, Washington representative of the American Association of Christian Schools; and Ed Whitcomb, former Governor, executive assistant to the president of Accelerated Christian Education, Lewisville, Tex.

Mr. Dingman, do you want to start?

STATEMENT OF RICHARD DINGMAN, LEGISLATIVE DIRECTOR, MORAL MAJORITY, INC., WASHINGTON, D.C.

Mr. DINGMAN. Thank you, Mr. Chairman.

I am here today representing Dr. Jerry Falwell and the membership of the Moral Majority across the country. In pursuit of your

request, I will truncate the testimony and only hit on the high points.

The CHAIRMAN. Let me say at the outset that the entire statements of the witnesses will be made a part of the record.

Mr. DINGMAN. Thank you, sir.

In your press release announcing this hearing, you made the statement, "Certainly it was not our intention in Congress to violate the fundamental separation between church and state as protected by the Constitution." We believe that statement. We believe it was not the intent of Congress to do that. However, we believe that they inadvertently did that, and that is why we are supporting the 2-year delay to consider other opportunities and alternatives.

The Moral Majority is in regular contact with many thousands of pastors across the country. And, sir, I am here to tell you today, as has already been said, that there is a major constitutional and a religious crisis brewing. For the reasons already stated, many hundreds if not thousands of pastors are simply not going to pay this unprecedented tax, because of deeply held religious conviction and because of their interpretation of it being a breach of constitutional protection.

They tell us that they will go to jail before they will allow the Caesar of government to take any portion of the tithes, gifts, and offerings given to God.

We are quite aware that no one likes new taxes, and every newly covered group can articulate wonderful reasons why they should be exempt. We are also confident that most Senators will view every such articulation as nothing more than a clever way to avoid paying this new tax.

However, I implore you to listen very carefully to the testimony and believe us when we tell you that our concerns are not the amount of the tax but the fact of the tax. In fact, Dr. Jerry Falwell's own ministry at Thomas Road Baptist Church has voluntarily participated in social security coverage for several years. So my purpose here today is not to spare him or his staff any new tax burden.

Many pastors have a deeply held doctrinal belief that tithes, gifts, and offerings given to God are the sole responsibility of the pastor and the duly-appointed officers of the church, and no outside force including the Federal Government may force the expenditure of God's funds. Thus, as God's law must be obeyed above man's law, these pastors will do everything necessary, including going to jail, to protect these funds from the dictates of Government.

When it was voluntary, ecclesiastical officers made the decisions. However, under the impending mandatory system, Government is attempting to usurp that decision from these ecclesiastical officers.

Besides the matter of religious conviction, there is also a major constitutional concern, as has been described earlier.

This new revolutionary tax on churches sets a frightening precedent.

Mr. Chairman, I believe the Congress inadvertently created this problem while wrestling with the monumental burdens of social security reform. I am aware of the political necessity to avoid a flood of exemptions from the tax. Thus, when nonprofit organizations were brought into the system, no serious consideration was given

to exempting church employees. There was fear that exempting churches would untie the whole package.

I urge your support of Senator Jepsen's bill so that we can have time to consider alternatives; otherwise, I think you had better advise the IRS and the legal machinery to get ready, because there will be a major confrontation, and I think that a new American revolution will indeed be underway.

The CHAIRMAN. I would just say, at that point, I think the estimated revenue loss of the Jepsen bill has been estimated to be about $1 billion.

I would also indicate that I left a copy of the summary of what we were doing today and a copy of the witness list at the White House just before I started the hearing; so they are aware of what we are doing here.

[Mr. Dingman's prepared statement follows:]

TESTIMONY BY MR. RICHARD B. DINGMAN, LEGISLATIVE DIRECTOR, MORAL MAJORITY, INC., ON S. 2099 - DELAYING SOCIAL SECURITY COVERAGE FOR EMPLOYEES OF RELIGIOUS ORGANIZATIONS - BEFORE THE COMMITTEE ON FINANCE, U.S. SENATE, DECEMBER 14, 1983.

Mr. Chairman, I am here today to express my strong opposition to the impending taxation of churches for the first time in American history. Further, I am here in support of S. 2099 which would give a two year delay in the implementation of this tax. Such a delay would give the Congress time to thoroughly consider what I believe was a major oversight and grave constitutional error by the Congress.

Mr. Chairman, in your press release announcing this hearing, you indicated that the relevant provisions of the Social Security bill had "created confusion among members of churches and other religious organizations." I respectfully suggest that it is not confusion which has prompted my testimony today. I think I know quite well what the Social Security bill does to churches.

Further, your press release said, "Certainly it was not our intention in Congress to violate the fundamental separation between church and state, as protected by the Constitution." I believe that statement. However, I also believe you did something you did not intend to do -- which is why I am asking for the two year delay to correct the error.

Your press release also said the new tax was "not on the church or religious organization." I respectfully disagree, since the church is obligated to pay the employer's share of the social security tax.

Mr. Chairman, the Moral Majority is in regular contact with many thousands of pastors across the country. I am here to tell you there is a major constitutional and religious crisis brewing. I have heard from literally hundreds of pastors who say they are simply not going to pay this unprecedented new tax on church employees. They tell me they will go to jail before they will allow the Ceasar of government to take any portion of the tithes, gifts and offerings given to God.

Let me briefly explain what is behind this impending revolution.

Until now, social security coverage has been optional for pastors and church employees. I am advised that a high percentage, perhaps more than half, of all church employees have voluntarily participated in the past.

I am quite aware that no one likes new taxes and every newly covered group can articulate wonderful and high sounding reasons why they should be exempted. I am also confident that most Senators will view every such articulation as nothing more that a way to avoid paying the new tax. However, I implore you to listen very carefully and believe me when I tell you that our concerns are not the amount of the tax, but the fact of the tax. In fact, Dr. Jerry Falwell's ministry has voluntarily participated in Social Security coverage for several years, so you can see my purpose here today is not to find a creative way to avoid a new tax burden.

I full recognized that the new tax change does not affect pastors, who still have an option. However, the new mandatory employer's share of the social security tax poses a serious problem for many pastors, including many who have voluntarily participated in the past. The change from voluntary to mandatory is forcing many pastors to rethink their past participation.

Many pastors have a deeply held doctrinal belief that tithes, gifts and offerings given to God are the sole responsibility of the pastor and the duly appointed officers of the church. No outside force, including the federal government, may force the expenditure of God's funds. Thus, as God's law must be obeyed above man's law, these pastors will do everything necessary, including going to jail, to protect these funds from the dictates of government. When it was voluntary,

ecclesiastical officers made the decisions. However, under the impending mandatory system, government is attempting to usurp that decision from these ecclesiastical officers.

Let me pause for a moment to clarify one point. I am aware that some concerned people have misunderstood the effect of this new tax, by thinking it would be a direct tax on the pool of funds known as tithes, gifts and offerings. I fully recognize such is not the case. But no matter how you define it, the new tax will have to be paid from the pool of tithes, gifts and offerings.

Besides the matter of religious conviction, there is also a major constitutional concern. I believe the Social Security bill, as signed into law, inadvertently breaches our long cherished separation of church and state. As we all know, the power to tax is the power to destroy. Thus, this revolutionary new tax on churches -- the first time the federal government has ever imposed a mandatory tax on churches -- sets a frightening precedent.

I am convinced that many legislators overlooked the unconstitutional taxing problem because of their beliefs that the Social Security program is a form of insurance coverage. However, Social Security is a TAX. It is NOT insurances. Congress has said it's a tax. The Social Security Administration says it's a tax. The Supreme Court has said 25 times that it's a tax. The IRS will sue an organizaiton in Tax Court for refusal to pay Social Security under charges of tax evasion.

Mr. Chairman, as I said earlier, I believe the Congress inadvertantly created this problem while wrestling with the monumental burdens of social security reform. I am aware of the political necessity to avoid a flood of exemptions from the tax. Thus, when non-profit organizaitons were brought into the system, no serious consideration was given to exempting church employees. There was fear that exempting churches

would untie the whole package.

From a revenue perspective, I understand a delay would result in a revenue loss of less than one-half of one percent of the expected NEW revenues resulting from expanded coverage.

In dealing with all the pressures of solvency of the social security fund, I am convinced the constitutional ramifications of the unprecedented taxation of churches was not thoroughly reviewed. This is why we need a delay similar to the one granted retired federal judges. Further, such a delay would also allow time to consider alternatives to the mandatory tax approach. I am convinced there are other ways to meet the old age needs of church employees without resorting to an unconstitutional, mandatory taxation of churches.

I urge your support of S. 2099 so there will be an opportunity to correct this error without a national confrontation and prosecution of pastors. Otherwise, you had better advise the IRS and the legal machinery to get ready because there will be a major confrontation.

A new American Revolution will be under way.

STATEMENT OF FOREST D. MONTGOMERY, COUNSEL, OFFICE OF PUBLIC AFFAIRS, NATIONAL ASSOCIATION OF EVANGELICALS, WASHINGTON, D.C.

Mr. MONTGOMERY. Mr. Chairman, my name is Forest Montgomery. I am here today on behalf of the 38,000 evangelical churches from every State in the Nation that are members of the National Association of Evangelicals.

At the outset I would like to say that I worked in the chief counsel's office of the Internal Revenue Service for 9 years, so I am familiar with the regulation and control that inevitably accompanies Federal taxation.

With all due respect, we assert that Congress, in the rush to enactment of the social security amendments earlier this year, did not fully appreciate the significance of taxing churches with respect to their religious activities.

I might say, in passing, that it has been suggested today that some church groups do not consider it a tax. As I read section 3111 in the Internal Revenue Code, that is exactly what is imposed on the church as an employer.

The experts will no doubt be divided on the constitutionality of taxing churches; however, that issue should never have to be adjudicated. The reason why I am here today is to urge that Congress act to forestall an inevitable confrontation between church and state, which the new social security law clearly threatens.

Whether or not the Supreme Court would interpret the first amendment as permitting a tax on the religious activities of

churches, the plain fact is that some churches are going to refuse to pay it on the basis of religious conviction.

There is a clear-cut distinction between unrelated business income of churches, which is subject to tax and paid by the church community without objection, and a tax with respect to the religious activities of a church.

Many churches believe that the tithes and offerings put in the collection plate belong to God, not Caesar, and hence cannot be paid to the Government as a tax. Members of this committee may not agree with this view; indeed, as we have heard today, I'm sure many of the church community will find no scriptural injunction blocking payment of the employer's share of the social security tax. But some churches cannot reconcile payment of that tax with their sincerely held religious beliefs and are thus put in the untenable position of having to choose between God and Caesar. They are thus forced by the change in the law to consider civil disobedience and face the distressing prospect of witnessing the IRS assessing taxes against their church and selling church assets to pay social security taxes.

This scenario is avoidable, and for that reason all the more tragic. There are numbers of actions Congress could take to demonstrate some sensitivity to the religious beliefs of many Americans without any impairment of the basic financial soundness of the social security system. The social security law could easily be changed to make coverage of church employees optional, as it has been for many years, to treat church employees as self-employed for social security tax purposes ministers are so treated under present law—or to make coverage of church employees optional, but in the absence of an election by the church to cover its employees, to treat those employees as self-employed for social security tax purposes.

Other solutions may be possible, but something must be done to remove the legal incidents of the social security tax from the church as employer.

Church opposition is not based on the economic incidence of the social security tax; this is not a mammon issue. We are familiar with churches which are presently paying social security taxes in order that their employees receive social security coverage, but which, as a matter of deeply held religious conviction, would refuse to pay any social security taxes when mandatorily imposed.

In the 1960's, Congress acted to exempt self-employed Amish from the payment of social security taxes, and of course the social security benefits, because of their sincerely held religious beliefs. A similar accommodation of the free exercise of religion is plainly called for here. Failure to act, especially in light of the fact that solutions are readily available to avoid the threatened church-state confrontation, will send an ominous message to the church community. There is no reason whatsoever to alienate God-fearing Americans who act out of deeply held religious conviction.

Therefore, we urge Congress in the strongest terms possible to act in the public interest by refraining from imposing a tax on churches with respect to their religious activity for the first time in our Nation's history. That action could be made retroactive to January 1, 1984.

Thank you.

The CHAIRMAN. Thank you, and thank you for the specific recommendations. I think the third one you mentioned has some attraction. We will look at all of them.

[Mr. Montgomery's prepared statement follows:]

December 14, 1983 Statement of
FOREST D. MONTGOMERY
Counsel, Office of Public Affairs
NATIONAL ASSOCIATION OF EVANGELICALS
on
MANDATORY SOCIAL SECURITY COVERAGE
FOR EMPLOYEES OF RELIGIOUS ORGANIZATIONS
before the
COMMITTEE ON FINANCE
UNITED STATES SENATE

Mr. Chairman and Members of the Committee:

My name is Forest Montgomery. I am Counsel to the Office of Public Affairs of the National Association of Evangelicals. The NAE is an association of some 38,000 churches included within forty-three member denominations and an additional thirty-five nonmember denominations. We serve a constituency of 10-15 million people through our commissions and affiliates, such as World Relief and National Religious Broadcasters.

I appreciate the opportunity to appear before this Committee to discuss the urgent need for Congress to come to grips with an issue which does not appear to have received the consideration it deserved at the time the Social Security Amendments of 1983 were enacted into law.

The change in the law has created considerable confusion in the church community. Some people were even led to believe that a tax had been imposed on church tithes and offerings. That, of course, is not true, but even the press release announcing this hearing has contributed to the confusion. That release contains the following statement: "Although the social security

tax would be levied on the earnings of covered employees, not on the church or religious organization, some concerns have nevertheless been raised about the constitutionality of this provision, which becomes effective January 1, 1984." (Emphasis added.)

The fact of the matter is that section 3111 of the Internal Revenue Code imposes a tax on employers, and by including church employers in the social security program on a mandatory basis, the legal incidence of the employer's share of the social security tax falls on the churches. The press release is symptomatic of the problem. With all due respect, we assert that Congress, in the rush to enactment of the social security amendments earlier this year, did not fully appreciate the significance of taxing churches with respect to their religious activities.

The experts will no doubt be divided on the constitutionality of so taxing churches. However, that issue should never have to be adjudicated. The reason why I am here today is to urge that Congress act to forestall an inevitable confrontation between church and state which the new social security law clearly threatens. Whether or not the Supreme Court would interpret the First Amendment as permitting a tax on the religious activities of churches, the plain fact is that some churches are going to refuse to pay it on the basis of religious conviction.

There is a clear cut distinction between unrelated business income of churches which is subject to tax and paid by the church community without objection, and a tax with respect to the religious activities of a church. Many churches believe that money put in the collection plate belongs to God, not Caesar, and hence cannot be paid to the government as a tax.

Members of this Committee may not agree with this view. Indeed, I am sure much of the church community will find no scriptural injunction blocking payment of the employer's share of the social security tax. But some churches cannot reconcile payment of that tax with their sincerely held religious beliefs, and are thus put in the untenable position of having to choose between God and Caesar. They are thus forced by the change in the

law to consider civil disobedience, and face the distressing prospect of witnessing the IRS assessing taxes against their church and selling church assets to pay social security taxes.

This scenario is avoidable — and for that reason all the more tragic. There are a number of actions Congress could take to demonstrate some sensitivity to the religious beliefs of many Americans without any impairment of the basic financial soundness of the social security system. The social security law could easily be changed:

(1) To make coverage of church employees optional, as it has been for many years,

(2) To treat church employees as self-employed for social security tax purposes (ministers are so treated under present law), or

(3) To make coverage of church employees optional, but in the absence of an election by the church to cover its employees, to treat those employees as self-employed for social security tax purposes.

Other solutions may be possible. But something must be done to remove the legal incidence of the social security tax from the church as employer. Church opposition is not based on the economic incidence of the social security taxes. This is not a mammon issue. We are familiar with churches which are presently paying social security taxes in order that their employees receive social security coverage, but which, as a matter of religious conviction, would refuse to pay any social security taxes when mandatorily imposed.

In the 1960's Congress acted to exempt self-employed Amish from the payment of social security taxes (and the concommitant social security benefits) because of their sincerely held religious beliefs. A similar accommodation of the free exercise of religion is plainly called for here. Failure to act, especially in light of the fact that solutions are readily available to avoid the threatened church-state confrontation, will send an ominous message to the church community. There is no reason whatsoever to alienate God-fearing Americans who act out of deeply held religious conviction.

We urge Congress in the strongest terms possible to act in the public interest by refraining from imposing a tax on churches with respect to their religious activities for the first time in our nation's history.

STATEMENT OF JACK CLAYTON, WASHINGTON REPRESENTATIVE, AMERICAN ASSOCIATION OF CHRISTIAN SCHOOLS, WASHINGTON, D.C.

Mr. CLAYTON. Thank you, Senator. It is good to be here to testify with you.

My name is Jack Clayton. I am Washington representative to the American Association of Christian Schools, and I represent the Kansas Association of Christian Schools.

The mandatory imposition of taxation of church ministries, as distinguished from taxes on an individual, creates a whole new relationship between Government and churches. My association does not object to businesses owned by religious organizations being from being fully taxed, but church ministries that are clearly confined to preaching and teaching, however, should neither receive funds from nor be compelled to pay taxes to the Government. Religious ministries are not ordinary commercial ventures, and the free exercise of religion is clearly restricted by compulsory taxation.

We find indefensible the preferential treatment shown by exemption that remains in effect for three special categories of religious groups in section 1402(e) that is not accorded equally to all religious employees. The three groups are: licensed, commissioned, and ordained ministers; No. 2, Christian Science practitioners; and, No. 3, members of religious orders.

The religious schools are a part of the church. In *Lemmon* v. *Kurtzman* in 1971, the Supreme Court held that a religious school was "an integral part of the religious mission of the church." This holding, which was used in order to deny financial benefits to religious schools, would also require, if consistently applied, the denial of taxation of a church ministry such as a church school.

Increasingly, however, at all levels of Government, we witness an intolerably inconsistent and capricious and unfair application of this Lemmon doctrine. Too often, whenever it pleases some branch of government to deny benefits to religious groups, schools or the religious groups are held to be religious. However, whenever Government desires to impose some sort of regulation or a tax, as this will be, in the first time in the Nation's history, the Lemmon doctrine will not be adhered to. We ask for consistency and fairness and understandability in our Nation's laws.

Thomas Jefferson said, "I consider the Government as interdicted by the Constitution from meddling with religious institutions, their doctrines, their disciplines, and their exercises." But I do want to reiterate what some of the other men have said. We are witnessing a very rapid erosion of religious liberty in this country. I have witnessed it in the European socialist regimes. It is terrible over there; there is no religious liberty. They feel that they are democratic, but there is no religious liberty because they have state churches. And we are moving toward a state church.

The power to tax the church is the power to control that church.

I must express some disagreement at some of the revenue projections that have been put forward. I have heard figures as high as $2 or $3 billion. You have just quoted $1 billion, and I was glad to hear it that low. However, at 7 percent, approximately 14 times

that, that would mean that these religious groups would have incomes of $14 billion, and I can assure you the money simply isn't out there; otherwise, a lot of us would like to go and recruit them in our organizations.

But it would be misleading to fail to stress again to this committee in the strongest possible terms that the opposition to this is widespread and it is intense. And I say this, even though members of our churches are part of the social security system. They either pay into it or they receive it. We don't have people trying to just be anarchists and destroy the Nation's tax structure. But there are questions here that have not been looked to.

I sympathize with the Members of Congress during all of the intense lobbying from powerful pressure groups, much more powerful than we seated here today at this table, and some of the details got looked over in the rush. And I don't feel that it would hurt anyone to take 2 more years and look at it and work out a reasonable accommodation for the legitimate constitutional interests of the religious groups and the legitimate interest of Government in its tax policies.

One final note: It is not surprising that we differ from religious organizations that have long been adhering to the social gospel. Most of the church is opposed to this emphatically reject the theological concept and the philosophical implications of the social gospel movement, so it is not surprising at all that we should have a different viewpoint on this issue.

I thank you so much for being here today, and I do hope that some mutually acceptable agreement will be able to be worked out by a 2-year delay.

The CHAIRMAN. Mr. Whitcomb.

[Mr. Clayton's prepared statement follows:]

TESTIMONY OF

JACK CLAYTON

OF THE

AMERICAN ASSOCIATION

OF CHRISTIAN SCHOOLS

BEFORE THE

SENATE FINANCE COMMITTEE

DECEMBER 14, 1983

My name is Jack Clayton. I am Washington Representative for the American Association of Christian Schools. Although many of the churches and their school ministries that belong to my association have voluntarily payed Social Security taxes for years, the mandatory taxes that become effective on January 1, 1984 are of gravest concern to us.

The mandatory imposition of taxation of church ministries (as distinquished from taxes on individuals) creates a new relationship between churches and government. My association does not object to businesses owned by religious organizations being fully taxed. Church ministries that are clearly confined to preaching and teaching, however, should neither receive funds from nor be compelled to pay taxes to the government. Religious ministries are not ordinary commercial ventures, and the free exercise of religion is clearly restricted by compulsary taxation.

We find indefensible the preferential treatment shown by the exemption given to the three special categories of religious groups in Section 1402 (e) that is not accorded equally to all religious employees. (The three groups are: 1. Ordained, Commissioned or licensed ministers, 2. Christian Science practicioners 3. Members of religious orders).

In Lemon v. Kurtzman, 403 U.S. 602 (1971) the Supreme Court held that a religious school was an "integral part of the religious mission" of the church. This holding which was used in order to deny financial benefits to religious schools would also require, if consistantly applied, the denial of taxation of a church ministry such as a church school.

Despite lobbying against mandatory coverage of church ministries by my association earlier this year, the importance of this matter was not thoroughly debated due to the much greater attention given to issues raised by the other controversial issues that existed at that time. In such sweeping legislation important matters of church and state were inadvertantly not given the attention that they should have received. Many churches have little or no Washington representation.

As the awareness of the full implications of this tax has spread across the nation, however, it has become evident that many churches share religious convictions against paying it. Increasing numbers of attorneys question its constitutionality. It would be misleading to this Committee to fail to stress in the strongest terms that the opposition is intense and widespread. Even many churches that voluntarily pay the tax strongly oppose its mandatory imposition on other churches.

It is most regrettable that such a church-state conflict should erupt when the economic impact is indeed very small. Recalling that the Section 1402 (e) exemption remains in effect for ministers, the economic impart of inclusion or exclusion of other religious employees would be very small indeed. Many such churches pay low salaries, and people work sacrificially.

Therefore, Congress should pass legislation providing for exemption for religious concientous objection against taxation of churches. At the very least a two year delay in the implementation of this tax on churches should be passed in order for both the federal government and churches to reach an accord that satifies all constitutional requirements and meets all the legitimate needs of government tax policy.

STATEMENT OF EDGAR D. WHITCOMB, EXECUTIVE ASSISTANT TO THE PRESIDENT, ACCELERATED CHRISTIAN EDUCATION, LEWISVILLE, TEX.

Mr. WHITCOMB. Thank you, Mr. Chairman.

I want to state at the outset that I wholeheartedly agree with the views stated by these other gentlemen—Mr. Dingman, Montgomery, and Clayton.

I have just finished a 3-month tour of the United States, of 40 States, in company with a well-known attorney for the Christian Law Association, Dr. David Gibbs. I saw him address groups of ministers throughout these 40 States and explain the new social security amendments to them and ask how many knew that before they came to that meeting. I can tell you that less than 5 percent of the ministers present—and I am talking about 3,000 to 4,000 ministers across 40 States—knew nothing about the social security amendments. That may seem strange, but that is exactly what we found.

Another thing, we can't underestimate the turmoil that this has caused in the religious community. The pastors are very much upset about it.

Across this country, thousands and thousands of Bible-believing people believe that the Bible requires them to give their children a Christian education in a Christian school. And this legislation flies directly into the face of their ability to do that.

Now, I represent Accelerated Christian Education from Louisville, Tex. This is a system that provides a curriculum for some 4,500 schools with an enrollment of something like a third of a million young people. Now, these people are being educated at no cost to the Federal Government. If these schools are put out of business, or if many of them are required to close their doors because of this legislation, it is going to cast an increased burden on the Government, which is now spending more than $2,000 per pupil to educate young people.

We have affidavits, which I put into the record, of 23 pastors from all across the United States, stating that the social security taxes on their employees will seriously jeopardize the continued operation of the schools. Money that is necessary for religious training will have to be used to pay taxes.

Now, the proposal has been made that the employees be treated as self-employed persons. But they are required, then, to pay a social security tax, and in many cases, in many of these schools across the country, they are unable to give them more money. They are operating on the ragged fringe financially, but I want to tell you that their record academically is excellent. A scoring of some 7,400 of them on the California achievement test showed that they averaged above 65 percent of the norm, which was primarily from public schools. So their record of training is excellent. Their sincerity in their religion is firm, and I want to suggest that I have in my brief a number of references from distinguished Supreme Court justices, who insist that the Federal Government should maintain at least a neutrality where religion is concerned.

In summary, I want to say that the imposition of social security taxes upon religious organizations will reduce the amount of

money available to churches for religious education and thus interfere with their ability to worship according to their belief. Many people feel very, very strongly about this.

The best interests of the people'of the United States will be served by abiding by the long-standing tradition of benevolent neutrality toward church and religious organizations.

Thank you.

The CHAIRMAN. Well, thank you very much, Governor.

[Mr. Whitcomb's prepared statement follows:]

December 14, 1983

To: Senator Robert J. Dole, Chairman
United States Senate
Committee on Finance
SD-219 Dirksen Senate
Office Building

Subject: Mandatory Social Security Coverage for employees of religious organizations

By: Edgar D. Whitcomb, Executive Assistant to President of Accelerated Christian Education, 2600 Ace Lane, Lewisville, Texas 75067

STATEMENT

Thousands upon thousands of Bible believing Christians all across the United States believe that the Word of God as stated in the Holy Bible* compels them to educate their children in a Christian school where the children can be taught to live their lives according to the Scriptures. These Christians believe that to do otherwise is to sin against the Lord's commandments. They know that their children will not get Biblical training as required by this commandment in the public schools and they know they will get it in the Christian schools.

There are some 4,500 Accelerated Christian Schools in the United States where about one-third of a million young people from 20 major religious denominations receive excellent academic and theistic education. A sampling of 7,428 of the students on the California

*NOTE: Chapter 6 of Deuteronomy (King James Version of the Holy Bible) states as follows:

(1) "Now these are the commandments, the statutes and the judgments, which the Lord your God commanded to teach you,...."
(2) That thou mightest fear the Lord thy God, to keep all his statutes and his commandments, which I command, the, thou, and thy son, and thy son's son, all the days of thy life; and that thy days may be prolonged.
(6) And these words, which I command the this day, shall be in thine heart.
(7) And thou shalt teach them diligently unto thy children, and shall talk of them when thou sittest in thy house, and when thou walkest by the way, and when thou liest down, and when thou riseth up."

Achievement Test (CAT) revealed that their level of achievement was 65th percentile. This means that they scored higher than 65% of the students in the norm group composed primarily of public school students. The research was conducted by Accelerated Christian Education with advisory counsel from CTB/McGraw-Hill who computer scored the results.

Though the quality of academic training is well above that of the public schools, many of the Christian schools operate on a bare bones budget from semester to semester. In the event the churches which run these schools are to be burdened with paying Social Security Taxes on their employees, many pastors believe that such tax will seriously jeopardize the continued operation of the schools. Money that is necessary for religious training will have to be used to pay taxes and a reduction of personnel will be necessary. Affidavits of a number of pastors are provided herewith stating that such tax will seriously jeopardize the financial status and economic condition of their church, school, and ministry, thus depriving parents of school children of their opportunity to educate their children according to their religious convictions.

The pastors and parents involved believe that their rights to practice their religion are protected under the provisions of the first Amendment of the Constitution of the United States: "Congress shall make no law respecting and establishment of religion, or prohibit the free exercise thereof...."

United States Supreme Court Justice Brennan concluded that taxation

would have its most disruptive effect on those with the least ability to pay the levies assessed against them. He felt this would divert funds available for religious purposes to support government taxation and would have a significant impact on religious organizations.*

Justice Harlan said in the same case, "What is at stake as a matter of policy is preventing that kind and degree of government involvement in religion that, as history teaches us, is apt to lead to strife and frequently strain a political system to the breaking point."

Mr. Chief Justice Burger in delivering the opinion of the Court said "... few concepts are more deeply embedded in the fabric of our national life, beginning with pre-Revolutionary Colonial times, than for the government to exercise at the very least the kind of benevolent neutrality toward churches and religious exercise generally so long as none was favored over others and none suffered interference."*

In delivering the opinion of the Court in Zorach v. Clauson, 343 U.S. 306, Mr. Justice Douglas stated at page 313-314 "That we are a religious people whose institutions presuppose a Supreme Being. We guarantee the freedom to worship as one chooses....

"We make room for a wide variety of spiritual needs of man deemed necessary....

"When the state encourages religious instruction.... it follows the

Walz v. Tax Commission, 397 U.S. 664

best of our traditions, for it then respects the religious nature of our people and accomodates the public service to their spiritual needs."

CONCLUSION

1. The imposition of Social Security Taxes upon religious organizations will reduce the amount of money available to churches for religious education and thus interfere with the ability of people to worship according to their belief.

2. The best interest of the people of the United States would be served by abiding by the long standing tradition of benevolent neutrality toward churches and religious organizations.

AFFIDAVITS PROVIDED BY THE FOLLOWING PASTORS

Rev. Earl B. Wise, Victory Baptist Church, Kenosha, Wisconsin

Dr. Henry N. Parrish II, Ecorse Baptist Temple, Ecorse, Michigan

Rev. Bennie Lee Hollingsworth, Hosanna Baptist Church

Rev. Jon E. Wall, Community Bible Church, Grand Forks, North Dakota

Rev. Darrel Dean Whitten, South Acres Baptist Church, Shreveport, Louisiana

Rev. Bob Larabee, Kenai Baptist Temple, Kenai, Alaska

Rev. Oscar R. Foster, Tabernacle Baptist School, Vero Beach, Florida

Rev. George A. Logan, Bel Air Baptist Church, Mobile, Alabama

Rev. Martin Blanton, Vacaville Baptist Church, Vacaville, California

Rev. Dean Silver, Maranatha Baptist Church, Marion, North Carolina

Rev. James Avaritt, Lakeland Baptist Temple, Calvert City, Kentucky

Rev. Duane B. Johnson, Maderna Baptist Church, Maderna, California

Dr. Charles F. Rigby, Central Park Baptist Church, Brookville, Florida

Rev. Larry Loser, Liberty Baptist Church, Carson City, Nevada

Dr. Ronald Kent Hoelz, Sr., Temple Baptist Church, Wilson, North Carolina

Rev. David A. Prearcy, Midland Baptist Temple, Midland, Texas

Dr. John Kager, Heritage Baptist Church, Orange Park, Florida

Rev. Joe Harrah, Calvary Baptist Church, Buckhannon, West Virginia

Rev. Jess E. Hill, Braeburn Baptist Church, Houston, Texas

Rev. B.K. Boruff, River Lake Baptist Church, Waverly, Tennessee

Rev. Ted Mitchell, Faith Bible Baptist Church, Shelby, Mississippi

Rev. Loren W. Snyder, Anchor Baptist Church, Seymour, Indiana

Dr. Hugh Hamilton, Hamilton Acres Baptist Church, Fairbanks, Alaska

C.A.T. Research Project

1. The study was sponsored by Accelerated Christian Education, Lewisville, Texas.

2. The manner in which the material was gathered is as follows:
   a) All schools using the A.C.E. program for three or more years were asked to participate. 177 schools responded.
   b) The schools were sent the 1977 C.A.T. materials with instructions to follow the Examiner's Manual.
   c) The completed answer sheets were sent to A.C.E. to be prepared for computer scoring.
   d) Answer sheets were computer scored by CTB/McGraw-Hill
   e) Results were sent to A.C.E. on Student Profile Records.

3. The size of the sample was 7,428 students. The potential universe was approximately 70,000:
   a) Grades 4-12 yield an average of 7,775 per grade (70,000 ÷ 9).
   b) 7,428 sampled yield an average of 825 per grade (7,428 ÷ 9).
   c) This yields a 10.6% sampling.

4. The study was conducted in May, 1983.

5. Test utilized was the 1977 normed California Achievement Test, CTB/McGraw-Hill, Monterrey, California.

Project Coordinator: Ron Johnson, Ph.D.
Project Analyst: Bill Jones, M.A.

California Achievement Test Results Show A.C.E. Works

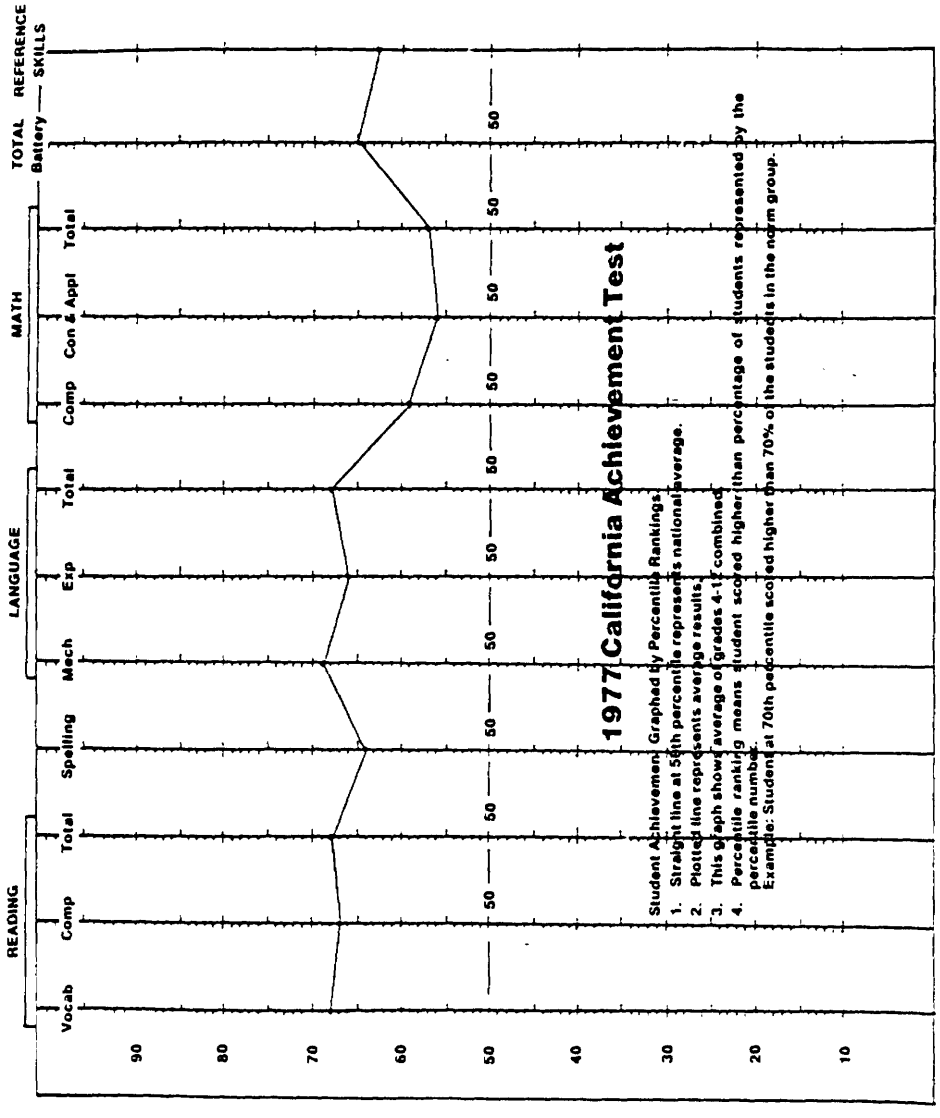
Test Data

Test Period: May 2-13, 1983
Test Instrument: 1977 California Achievement Test
Sampling: 7,428 students using A.C.E. Curriculum
177 church-schools using A.C.E. four or more years
40 states
Scoring: by C.T.B./McGraw Hill—California office

Grade Equivalent Results

GRADE	READING		TOTAL READING	SPELLING	LANGUAGE		TOTAL LANGUAGE	MATHEMATICS		TOTAL MATH	TOTAL BATTERY	REFERENCE SKILLS
	Vocabulary	Comprehension			Mechanics	Expression		Computation	Applications & Concepts			
*4	4.5	4.4	4.4	4.2	4.6	4.3	4.4	3.6	3.8	3.7	4.2	4.1
*5	6.4	6.2	6.2	5.6	6.4	6.6	6.4	5.3	4.8	5.1	5.6	5.7
6	8.0	8.0	8.0	8.5	8.0	8.3	8.1	7.7	6.7	7.3	7.5	7.9
7	10.0	10.0	10.0	9.5	10.0	9.7	9.8	8.6	8.1	8.3	8.9	9.5
8	11.0	11.6	11.3	11.5	11.7	11.0	11.2	10.5	9.9	10.0	10.5	10.8
9	12.5	12.9	12.9	12.5	12.9	12.3	12.9	12.5	12.2	12.5	12.9	12.1
10	12.9	12.9	12.9	12.5	12.9	12.9	12.9	12.5	12.9	12.5	12.9	12.9
11	12.9	12.9	12.9	12.5	12.9	12.9	12.9	12.5	12.9	12.5	12.9	12.9
12	12.9	12.9	12.9	12.5	12.9	12.9	12.9	12.5	12.9	12.5	12.9	12.9

Highest possible score: Reading, Language, and Math Applications and Concepts, 12.9; Spelling and Math Computation, 12.5
*Scores reflect major differences between scope and sequence of curriculum and C.A.T.


READING
LANGUAGE
MATH
TOTAL REFERENCE SKILLS
Vocab
Comp
Total
Spelling
Mech
Exp
Total
Comp
Con & Appl
Total
Battery
90
80
70
60
50
40
30
20
10
1977 California Achievement Test
Student Achievement Graphed by Percentile Rankings.
1. Straight line at 50th percentile represents national average.
2. Plotted line represents average results.
3. This graph shows average of grades 4-12 combined.
4. Percentile ranking means student scored higher than percentage of students represented by the percentile number.
Example: Student at 70th percentile scored higher than 70% of the students in the norm group.

Comparison of Supervisor's Level of Education with Students' Scale Scores

Supervisor's Highest Level of Education	Distribution Percentage of Supervisors	Number of Students with Supervisors in This Category	Number of Students Tested	Students' Scale Score	Point Difference from Average of 580
High School	15	1,040	5,174	575	−5
One Year of College	3	224	4,611	576	−4
Two Years of College	8	520	5,217	580	−0
Three Years of College	8	579	5,235	582	+2
Four Years of College	35	2,389	5,213	579	−1
Five Years of College	11	733	5,245	583	+3
Six Years of College	13	896	5,274	586	+6
Seven Years of College	5	312	5,335	593	+13
Eight Years of College	*1	67	3,409	568	−12
Nine Years of College	*1	72	5,205	578	−2
Total		6,832			

*Actual figure less than one percent

Scale Scores: Average 580 High 593 Low 575
Difference in range: 18 points

Scale Scores are produced from a single, equal-internal scale of scores across all grades for use with all levels of C.A.T. C and D.

Comparison of Supervisor's College Major With Students' Scale Scores

Major Field in College	Distribution Percentage of Supervisors in the Study	Number of Students with a Supervisor in the Major	Number of Students Reporting	Scale Score	Point Difference from Average 582.5
Math	5.5	390	5,251	583	+.5
English	5	339	5,205	578	−4.5
Bible	19	1,324	5,187	576	−6.5
Science	7.5	516	5,260	584	+1.5
Social Studies	5.5	373	5,305	589	+6.5
Elementary Education	11	758	5,194	577	−5.5
Phys. Ed.	3	191	4,644	581	−1.5
Music	2.5	182	5,322	591	+8.5
Other	19	1,292	5,285	587	+4.5
Not College Graduate	22	1,500	5,209	579	−3.5

Scale Scores: Average 582.5 High 591 Low 576
Difference: 15 points

Scale Scores are produced from a single, equal-internal scale of scores across all grades for use with all levels of C.A.T. C and D.

Supervisor Analysis Data

81% have 2 or more years of college training

85% of Elementary supervisors have college training

89% of Junior High supervisors have college training

90% of High School supervisors have college training

Of those with college degrees:

65% have earned graduate credit

50% have degrees from secular colleges

43% have degrees from Christian colleges

7% have degrees from both secular and Christian colleges

62% are not accredited/certified

40% have college majors in education

13% have no college training*

* 66% supervise in Elementary

18% supervise in Junior High

16% supervise in High School

The CHAIRMAN. Is it a fair question to ask. If nothing happens in the legislative area, are there plans being made to test the constitutionality of the law? There has obviously been no violation of it yet, but are plans being made?

Mr. DINGMAN. Well, sir, you asked that question of Mr. Ball, and of course he is the person that any of our groups would probably turn to to prosecute such a case.

I can only tell you that my intuitive feeling is that, yes, there will be a test of it if necessary. I would expect that since the collection procedures of social security taxes, most churches having small numbers of employees, therefore they probably would only have to submit quarterly. Those larger churches would have to submit monthly. So, we at least have to the end of January before we face a problem, possibly until the end of March. So hopefully there is enough time that we can work out a resolution without there being a crisis.

But I would expect that if we come to a confrontation, there will indeed be a major crisis.

The CHAIRMAN. Right. I think the Jepsen proposal—certainly I understand the purpose of it, but if there is some way to resolve the question in a month, there is no need of waiting 2 years to resolve it. Probably 2 months.

Mr. DINGMAN. We would entertain, sir, an amendment to the Jepsen amendment to make it permanent. [Laughter.]

The CHAIRMAN. We want to make Jepsen permanent, too. [Laughter.]

I mean, he's a friend of mine; so we want to put that in the first line.

But if we could find a solution, we would make that permanent. And I think Mr. Montgomery has made some concrete suggestions.

But on the other hand, if we are talking about individuals as opposed to churches or organizations, then I think we do have to be concerned about the wellbeing of the individuals when they reach that point in life where they need medical care and retirement pay. Unless there is some retirement plan, or unless they have considerable means themselves, then I think we had better take care of that obligation up front rather than having the Government take care of it of the other end.

Mr. WHITCOMB. Mr. Chairman, there are a lot of deeply religious people out there who feel that this really isn't a matter that should be of concern to the Federal Government. And I can tell you truthfully that I feel strongly that, if this law is passed, there are going to be a lot of court cases and a lot of tests.

The CHAIRMAN. I don't know, maybe that's true. But it might be a concern for the Federal Government for those same people, 30 to 40 years from now if they have no place to live and no work and no income. I think that is a real possibility that we have to focus on, even though I understand the difference between an organization—I think I do—and what the Supreme Court said in a few cases of individuals.

As I understand it, you are not quarreling on the individual side; you say it is unconstitutional because it is taxing the church.

Mr. DINGMAN. Sir, if I may suggest, I would hope that as you consider alternatives, that you would still seriously consider the op-

tional alternative, because many people who serve as employees of churches do so out of a genuine desire to be of service to the Lord, not because they need financial remuneration of any sort. Many times it is spouses, where their husbands are providing for their family needs. Retirement is not their goal.

Now, certainly, where an individual, that's their sole income, and retirement must be a consideration, perhaps they should have the option of being in or out. But I would hope it would not be mandatory upon all church employees that they have to pay it as a self-employed, but leave it to an option so that it would encourage the voluntary participation in church ministry of many individuals.

The CHAIRMAN. Mr. Montgomery.

Mr. MONTGOMERY. Mr. Chairman, let me just comment on your suggestion that, after all, these people do get old and are going to need to sustain themselves in their later years. I am unaware of a single member of the Amish faith who is being supported by the Government. They deeply believe in the tenet that they will take care of their own, and that's exactly what they do.

So I would reject the suggestion that people are going to opt out of the social security and then turn their backs on their brothers and sisters when they get old.

The CHAIRMAN. Well, I would like to think that was the case, and I would like to think that their children felt the same way.

Mr. CLAYTON. Senator, even if people want to come on in to the system, it is going to have a very disruptive effect on some of the existing programs. Of course, some of the people were planning on retiring on age 55 or age 60, and now they face prospects of even having to retire at age 67. And some of them are not able to do that.

Furthermore, in checking yesterday with the Social Security Office in Baltimore, I found that before you could qualify for survivors benefits you would have to get in 40 quarters. It is something like 10 years that these people would have to wait before they would qualify, and maybe a shorter period—I have forgotten what it was—for disability.

The CHAIRMAN. Mr. Myer is nodding No. He is going to be next, so we can question him on that.

Mr. CLAYTON. But even for people who wish to cooperate, there are some details that should be worked out for a smoother transition. And again, I think the 2-year delay would at least let everybody look at it together and see who have genuinely deeply-held religious convictions that are evidenced by their provision for their people, and they should be, in the long run, given permanent exemption. But for people, if there is held to be a Government interest there, it certainly should not be imposed by a tax on a church.

The CHAIRMAN. Well, I am not certain there is any magic in the 2 years. Somebody said we ought to put in 2 years. It might be less, it might be more, it might be none of the above.

We appreciate very much your testimony, and your entire statements will be made a part of the record.

I would like to call now on Mr. Robert J. Myers, a former Executive Director of the National Commisssion on Social Security Reform, and a long-time actuary and expert on social security.

Mr. Myers, you heard the testimony. Do you have a solution?

STATEMENT OF ROBERT J. MYERS, FORMER EXECUTIVE DIRECTOR, NATIONAL COMMISSION ON SOCIAL SECURITY REFORM, WASHINGTON, D.C.

Mr. MYERS. Mr. Chairman, I think that there are several possible solutions, including the one that you mentioned and some of the other witnesses did, too.

The CHAIRMAN. Would you answer the questions raised earlier?

Mr. MYERS. Yes, I'll try to.

One question that was raised was whether originally social security was a voluntary system. The answer is that it was not. When the program was first put into effect, January 1937, all the people who were then covered—workers in industry and commerce—were on a completely mandatory coverage.

The second question raised was whether people are required to obtain social security numbers. There is no law saying that they must do so, but the employer is required to report people's names and numbers when reporting the taxes. Likewise, individuals are required to have social security numbers for certain other Federal purposes such as some of the public assistance programs, but, more importantly, for the income tax. Anybody who files an income tax statement, as I understand it, must get a social security number, or there will be a rather severe penalty if they do not.

Now, as to the point that one of the gentlemen just made, that it takes quite a while—he mentioned 40 quarters—before people would get any benefits. As the chairman will recall, there was a special provision in the 1983 act for those people who were newly covered by the system who were with any nonprofit organization. People who are age 60 or older on January 1, 1984, will only have to have six quarters of coverage, which was a requirement applicable to all persons in the early 1950's, and it gradually increases for these nonprofit employees until, for those under age 55, the usual standards apply.

I might mention one other point before getting to the possible solutions. As you recall, when the National Commission considered the question, and also the question of the coverage of State and local employees, we did look into its constitutional aspects, mostly, of course, for State and local employees. But as far as the nonprofit employees were concerned, we did have available to us a legal opinion that was given to the Universal Social Security Coverage Study Group, which was established by the 1977 act. It had a legal opinion from Professor Dorsen of the Columbia University Law School, who is a professor of constitutional law. He states that there is no constitutional bar to coverage of nonprofit employees except possibly as to those employees of religious organizations which have sincere views antithetical to participation in a public insurance program.

So we did look at this matter, and apparently the Commission decided that there was——

The CHAIRMAN. It might be well to have that entire opinion made a part of the record.

Mr. MYERS. Yes, I will do that. I will place the entire letter from Professor Dorsen in the record.

[Mr. Myers' prepared statement and a excerpt from a report written by Professor Dorsen follow:]

STATEMENT BY ROBERT J. MYERS BEFORE THE COMMITTEE ON FINANCE, UNITED STATES SENATE, DECEMBER 14, 1983, WITH REGARD TO S. 2099, WHICH WOULD DELAY MANDATORY SOCIAL SECURITY COVERAGE OF EMPLOYEES OF RELIGIOUS ORGANIZATIONS.

Mr. Chairman and Members of the Committee: My name is Robert J Myers. Until February, I was Executive Director of the National Commission on Social Security Reform. Thereafter, I was a consultant to this Committee during the legislative considerations which led to the enactment of the Social Security Amendments of 1983. The following remarks represent entirely my own views.

In the following testimony, I will first set forth for the record the historical development of the Social Security coverage provisions for lay employees of charitable, educational, and religious non-profit organizations (hereafter referred to as non-profit employees). Then I will discuss certain existing cases where special treatment is given to persons in connection with religious considerations, and also the constitutionality aspects of mandatory coverage of employees of religious organizations. Finally, I shall give my views on S. 2099, introduced by the distinguished Senator from Iowa, Mr. Jepsen.

History of Social Security Coverage of Non-Profit Employees

The Committee on Economic Security, which made the studies underlying the Social Security Act of 1935, recommended compulsory coverage of all non-profit employees, except those who were non-manual workers earnings $250 or more per month. This is indicated by the fact that the Committee did not mention them for exclusion, as it did for certain employment categories (see "Report to the President of the Committee on Economic Security", January 15, 1935, page 29).

Both the House and Senate versions of the 1935 legislation, however, excluded non-profit employees from coverage (except for the employees involved when the organization operates a business). The committee reports on the legislation did not explain this exclusion. However, from my recollection of the events of those days, this action was taken primarily at the request of the non-profit organizations, whose budgets were very restricted in the depression years and who argued that their traditional non-taxability should apply in this case.

Subsequently, the non-profit organizations changed their minds as to the desirability of Social Security coverage. For one thing, they were having difficulty in hiring employees because of the absence of coverage. Also, they came to realize that, of all organizations, certainly they were the last who should not, through the Social Security program, take care of the basic economic retirement needs of their employees.

Accordingly, when significant revamping and extension of the Social Security program was legislated in 1949-50, many non-profit organizations advocated coverage for their employees. However, they requested that this be on an elective basis, by waiving their tax-exempt status for the purpose of the Social Security taxes. For example, the House Committee Report stated "Such organizations have expressed almost unanimously a desire for coverage provided that their traditional tax-exempt statue would not thereby be threatened" (House Report No. 1300, 81st Congress, August 22, 1949, page 12). Under the House bill, all non-profit employees would be compulsorily subject to the Social Security taxes, but the non-profit organizations would be exempt from such taxes unless they elected to waive the tax exemption. If the employing organization did not pay the taxes, the employee would be given credit for benefit purposes for only half of her or his taxable wages. The waiver of tax exemption by the employer would be in effect for at least 7 years, with a 2-year advance notice of termination being required. The Committee Report stated that the evidence was that the great majority of non-profit organizations would elect to pay the employer tax (House Report No. 1300, 81st Congress, August 22, 1949, page 12).

The Senate version of the 1949-50 legislation was on a somewhat different basis. All non-profit employees other than those of religious organizations would be compulsorily covered, insofar as both the employee and employer would be concerned. Employees of religious denominations and of organizations owned and operated by a religious denomination would be covered on an elective basis, which would be irrevocable (Senate Report No. 1669, 81st Congress, May 17, 1950, page 15).

The Conference Agreement for the 1950 Act produced the procedure for the coverage of non-profit employees that essentially remained in effect until the change to mandatory coverage resulting under the 1983 Act. In essence, the non-profit organization could elect coverage by waiving its tax exemption, and then all employees at that time would have the individual option of electing coverage, while all future employees would be compulsorily covered. Originally, at least two-thirds of the employees had to elect coverage, but this requirement was eliminated in the 1954 Act (in large part because the vast majority of the affected employees were electing coverage). The non-profit orgnization could, without any vote or election by the employees concerned, withdraw from Social Security after at least 10 years of coverage, with a 2-year advance notice being required (such 2 years being included in the 10-year requirement).

Constitutionality of Mandatory Coverage of Non-Profit Employees

The 1977 Amendments required that the Secretary of Health, Education, and Welfare make a thorough study of the feasibility and desirability of covering under Social Security various groups which were not then covered, including non-profit employees. As a part of this study, a legal memorandum was prepared by Professor Norman Dorsen, Professor of Constitutional Law, Columbia University, as to whether Congress has the power to extend Social Security coverage on a mandatory basis to non-profit employees. That memorandum is contained in "Report of the Universal Social Security Coverage Study Group", transmitted by the Secretary of Health, Education, and Welfare (Ways and Means Committee Print 96-54, March 27, 1980), page 261.

Professor Dorsen concluded that the Due Process Clause of the Constitution is not a factor in this matter. Nor did he believe that the Free Exercise Clause of the First Amendments posed any problems, except possibly for the religion clauses thereof insofar as religious organizations which have sincere religious tenets antithetical to participation in a public insurance program like Social Security are concerned. He went on to state that "in such rare cases Congress could avoid the constitutional problem by exempting the religious organizations".

30-336 O—84——9

Existing Exclusions from Social Security Coverage because of Religious Beliefs

Three categories of individuals (not employing organizations) have special features as to opting out of or into the Social Security program. First, under the so-called Amish provision, self-employed persons who are members of a religion which is opposed to accepting benefits under any private or public insurance plan, and which was founded before 1951, can elect to opt out of Social Security insofar as their self-employment income is concerned and thereby forfeit all rights to benefits arising from any employment. Second, ministers and members of religious orders who are not under a vow of poverty may elect, within a limited period, to opt out of paying Social Security taxes on their ministerial services (and receiving earnings credits therefrom) if they have religious principles or conscience against the acceptance of benefits from a public insurance program which are based on their ministerial services. Third, members of religious orders who are under a vow of poverty (and thus have no earned income that could be taxable or creditable) can be covered by an irrevocable election by their religious order to cover all such members (and lay employees of the order as well); the taxes and earnings credits for such members are based on the value of the subsistence provided by the order.

My Views

The National Commission on Social Security Reform recommended -- and the Congress agreed -- that there should be mandatory coverage of all non-profit employees, beginning in 1984. Many such employees would otherwise have been covered under the program for only part of their working lifetimes and thus would receive unduly large benefits relative to the taxes paid, whereas other employees would not qualify for benefits. Accordingly, in line with the long-standing principle of the desirability of universal coverage for all persons in paid employment in the country, it seemed desirable to apply this principle to non-profit employees (about 80% of whom were covered under the elective process). Furthermore, a number of non-profit organizations were terminating Social Security coverage and thus causing a significant financial drain on the system, because their employees had already qualified for substantial benefits without further coverage being required.

This was one of the many recommendations which together would provide the necessary resources to restore financial stability to the Social Security program over both the short range and the long range. It was widely recognized that, if any single provision were deleted from the consensus package, it would very likely mean that the entire package would become unraveled, and the financial crisis would not be solved.

S. 2099 would delay for two years the mandatory Social Security coverage of employees of religious organizations and of charitable or educational organizations which are affiliated with a religious organization. In my opinion, this should not be done, or certainly not on such a broad scale.

First, it would be very difficult to determine what being "affiliated with a religious organization" might mean. Many organizations, such as hospitals and colleges have a very loose and relatively minor affiliation with a religious organization, with little or no financial control and participation being involved. Certainly, such organizations should not be exempt from mandatory coverage of their lay employees.

Second, I believe that, at the most, religious organizations should not be given a delay or be exempt from the mandatory Social Security coverage of their lay employees beginning in 1984 unless they have well-established religious principles and tenets against participating in any form of public insurance for both themselves and their members, and have held these views for a significant number of years in the past. Also, any such delay or exemption should apply to the religious denomination itself and its member churches and to only those charitable and educational organizations affiliated with such a religious denomination which are wholly owned thereby and which serve only members of such religious denomination and their immediate families.

Certainly, it would seem that the vast majority of religious organizations are in favor of the principle that their employees should have the rights to the basic floor of economic security protection provided by the Social Security program and, at the same time, bear the responsibility of financing this program.

EXCERPT FROM "REPORT OF THE UNIVERSAL SOCIAL SECURITY COVERAGE STUDY GROUP", TRANSMITTED BY THE SECRETARY OF HEALTH, EDUCATION, AND WELFARE ON MARCH 24, 1980, JOINT COMMITTEE PRINT, WMCP: 96-54, MARCH 27, 1980

Appendix

Mr. W. J. Tennant
Universal Social Security Study
Department of Health, Education, and Welfare
Washington, D.C. 20201

Dear Mr. Tennant:

You have asked my opinion whether Congress has the power to extend social security coverage to employees in the private nonprofit sector, including churches and religious organizations. In particular, you have inquired whether the First Amendment or Due Process Clause presents obstacles to mandatory coverage.

In my judgment the Due Process Clause is not a factor in the nonprofit sector. The more difficult questions concern the applicability of the religion clauses of the First Amendment. As to those my opinion is that for Congress to compel participation in the social security system would not be invalid under the Establishment Clause as involving an excessive entanglement in church affairs. On the other hand, in particular factual circumstances it might violate the Free Exercise Clause to require the participation of sects with sincere religious tenets antithetical to participation in such a scheme. In such rare cases Congress could avoid the constitutional problem by exempting the religious organizations. My reasons for these conclusions follow.

Due Process Clause. For forty years the Due Process Clause has been rejected as a bar to federal social security regulation. As early as 1937, when the Court in Steward Machine Co. v. Davis, 301 U.S. 548, and Helvering v. Davis, 301 619, rejected objections to the Social Security system, this clause has not been a factor in constitutional adjudication in this area. The contemporary test under the clause is whether the government has a rational basis for its economic regulation or tax. See, e. g., Williamson v. Lee Optical Co., 348 U. S. 483 (1955). There is a plain "rational" governmental interest in expanded social security coverage in that it provides for the old age and economic security, of the segment of the population not presently covered. There is no basis for a contrary conclusion in recent Supreme Court cases or in principle.

First Amendment. A more difficult question is presented under the religion clauses of the First Amendment.

The Social Security Act currently exempts twenty categories of employment from mandatory participation in the Social Security system (the "System"). See 42 U.S.C. § 410(a) (Supp. 1979). Of immediate pertinence is the exemption of services performed in the private not-for-profit sector, including churches and religious organizations. 42 U.S.C. § 410 (a) (8) (B). Pursuant to this exemption, employers and employees neither pay the otherwise required social security withholding tax nor receive the coordinate federal benefits upon reaching age sixty-five. Any organization eligible for the exemption may, however, waive it for consenting employees by filing an appropriate certificate with the Internal Revenue Service. Id.; see I.R.C. § 3121(k).

The legislative history of this statutory exemption reveals that its adoption can be attributed to a Congressional decision to enact the System incrementally, with primary and immediate attention directed to industrial workers. See Sen. Rep. 628, 74th Cong. 1st Sess., May 13, 1935 at 9. The exemption of religious organizations did not arise from a constitutional concern that compulsory participation would violate First Amendment principles. Moreover, there is no evidence that constitutional concerns motivated either the continuation of the exemption throughout.

Two sorts of challenges may be raised to the compulsory participation plan. The first would challenge the governmental involvement in church affairs spawned by participation in the System. The constitutional infirmity alleged is not that participation conflicts with church tenets but rather that participation impermissibly entangles church and state affairs. The second challenge would be based on the claim of a religious organization that compulsory participation in the System violates basic church principles concerning such matters as acceptance of private or public insurance benefits or assistance to the elderly. The following discussion analyses the First Amendment issues and applies the established constitutional principles to these two challenges.

The First Amendment to the United States Constitution commands, in relevant part, that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof..." Although the Supreme Court once described the wall between church and state as "high and impregnable", Everson v. Board of Education, 330 U.S. 1, 18 (1947), it later acknowledged the boundary had become "blurred and indistinct". Lemon v. Kurtzman, 403 U.S. 602, 614 (1971). Neutrality in fact as well as name remains the articulated requisite of governmental action. Committee for Public Education v. Nyquist, 413 U.S. 756, 788 (1973); Wisconsin v. Yoder, 406 U.S. 205, 220 (1972). Moreover, the "excessive entanglement" of church and state affairs is prohibited. Meek v. Pittenger, 421 U. S. 349, 358 (1975); Walz v. Tax Commission, 397 U.S. 664, 674 (1970).

Yet the Court, recognizing that separation cannot mean the "absence of all contact", Walz v. Tax Commission, supra, 397 U.S. at 676, has devised an analytical test for free exercise cases. See Wisconsin v. Yoder, supra, 406 U.S. at 214. The threshold inquiry under the test is whether the practice of legitimate beliefs would be burdened or inhibited by governmental action. If this query is answered affirmatively, the state must then demonstrate that the interference is justified by a compelling state interest. Id.

The Entanglement Challenge. The religious burden allegedly imposed by governmental action in the entanglement challenge does not stem from a compulsion to perform acts "undeniably at odds with fundamental tenets of ...religious beliefs." Wisconsin v. Yoder, supra, 406 U. S. at 218. Rather, the objection to compulsory participation in the System rests upon the more general governmental intrusion into religious affairs fostered by such action. The claim, in essence, is that the administrative requisites of the Social Security program would significantly entangle state and church affairs, compromising church independence and autonomy. This first challenge thus represents a broad attack on the Proposal since any religious organization could claim interference with free exercise, even in the absence of a specific conflicting religious tenet.

Although the entanglement issue traditionally arises in an establishment clause context, see e.g., Tilton v. Richardson, 403 U.S. 672 (1971); Lemmon v. Kurtzman, supra; Walz v. Tax Commission, supra, excessive entanglement can also serve as a basis for a free exercise claim. McCormick v. Hirsch, 460 F. Supp. 1337, 1353 (M.D. Pa. 1978); see Catholic Bishop of Chicago v. N.L.R.B. 559 F. 2d 1112, 1124-127 (7th Cir. 1977), aff'd on other grounds, 99 S.Ct. 1313 (1979). As in the establishment cases, administrative entanglement is measured by the extent of government resolution of internal religious disputes. See L. Tribe, American Constitutional Law, 869-70 (1978). The test is, of course, "inescapably one of degree." Walz v. Tax Commission, supra, at 674.

Successful free exercise entanglement challenges have contested governmental interference with basic ecclesiastical decisions concerning church administrative policies and practices. For example, in Catholic Bishop of Chicago v. N.L.R.B., supra, the Supreme Court upheld the denial of N.L.R.B. jurisdiction over labor disputes in schools operated by religious organizations. While basing its decision on statutory construction of the National Labor Relations Act, the Court noted a "significant risk" of First Amendment infringement. 99 S.Ct. at 1320.

The Seventh Circuit opinion in Catholic Bishop reached the constitutional question. The court disapprovingly noted the prospect of extensive N.L.R.B. supervision of church employment practices, as well as N.L.R.B. resolution of employment disputes concerning matters such as workload, employee discipline, and curricular responsibilities. 559 F. 2d at 1123, 1127. Since these matters often go to the heart of church doctrine, the court held that extension of N.L.R.B. jurisdiction violated First Amendment guarantees. Id. at 1127, 1131; accord, McCormick v. Hirsch, supra (preliminary injunction granted restraining the N.L.R.B. from asserting jurisdiction over a parochial school whose teachers sought unionization). In a similar context, the prohibition against religious discrimination in employment under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq., has been held inapplicable to relations between a church and its ministers. Here too, the court concluded the exercise of jurisdiction would "inject the state into substantive ecclesiastical matters." McClure v. Salvation Army, 460 F. 2d 553, 560 (5th Cir. 1972).

These cases can be readily distinguished from the entanglement challenge in the social security context. It is unlikely that opponents of the Proposal could demonstrate that participation in the social security system would compel church authorities to share substantive decision-making power with the state. Unlike the successful challenges in other cases, the governmental actions involved in operating the social security system require neither an alteration of ecclesiastical hierarchies nor the modification of administrative policies implicating church doctrine.

At most, participation in the social security system would require religious organizations to transfer periodic withholding payments and submit certain financial records substantiating the payments. Required subsmission of records alone has, in other contexts, failed to constitute impermissible entanglement. See Surinach v. Persquera de Busquets, 460 F. Supp. 121, 123 (D. Puerto Rico 1978). Even where the records demanded by the State included information about the sources and method of financing religious schools, pricing policy, and teacher salaries and benefits, the mere inspection of financial records did not did not constitute a violation. Id.

In conclusion, it is unlikely that the entanglement challenge would succeed even in passing the free exercise threshold requirement of governmental interference. A government mandate that religious organizations submit certain financial records in connection with social security withholding fails to constitute interference with basic ecclesiastical decision making. In this circumstance, the government would prevail without any need to demonstrate the existence of a compelling state interest.

The Religious Belief Challenge. The second hypothetical challenge to the proposal presents a more substantial free exercise argument. First, this challenge presumes that the religious organization can successfully demonstrate that its participation in the System would violate basic religious tenets. This would exist if, for example, the underpinnings of a religious faith fundamentally conflict with the acceptance of public financial assistance, or with the System's conception of assistance to the elderly. While I know of no religious faith in this category, it seems a plausible possibility that must be considered.

Indeed, in enacting an exemption to the Social Security self-employment tax, I.R.C. § 1402(g), in 1965, Congress contemplated precisely this conflict. See Sen. Rep. 404, 89th Cong., reprinted in [1965] U.S.CODE CONG. & AD. NEWS 1959. The Internal Revenue Code provides the exemption to members of recognized religious sects "by reason of which [they are] conscientiously opposed to acceptance of the benefits of any private or public insurance which makes payments in the event of death, disability, old-age, or retirement or makes payments toward the cost of, or provides services for, medical care (including the benefits of any insurance system established by the Social Security Act)." I.R.C. § 1402(g).

In a related matter, a federal district court upheld a free exercise challenge to a welfare regulation requiring recipients to obtain social security numbers for their children as a condition of assistance. Stevens v. Berger; 428 F. Supp. 896 (E.D.N.Y. 1977). The court ordered waiver of the regulation on the basis of the parents' sincere religious belief that the use of such numbers was "antichrist" and would bar their children "entry to Heaven." Id. at 897,908.

The First Amendment would recognize and protect religious beliefs such as those contemplated in the second challenge, provided they are central to the religious faith and sincerely held. See Wisconsin v. Yoder, supra, 406 U.S. at 216, 235; Sherbert v. Verner, 374 U.S. 398, 406 (1963) (Brennan J., concurring). Given a protected interest in religious expression, the Constitution closely scrutinizes government actions which pose even a potential threat. Lemon v. Kurtzman, supra, 403 U.S. at 620; McCormick v. Hirsch, supra, 460 F. Supp at 1353. The Supreme Court has held that such a threat exists when government action imposes a "severe and inescapable" conflict with the practice of religious beliefs. Wisconsin v. Yoder, supra, 406 U.S. at 218.

In Wisconsin v. Yoder, the Supreme Court held that a compulsory school attendance requirement had a coercive effect on Amish religious practices. The requirement forced parents either to abandon their beliefs and expose their children to the "wordly influences" of public education, or migrate in the face of criminal penalties. Required participation in the social security system represents a potential conflict similar in kind, if different in degree. Clearly, a mandatory financial contribution cannot constitute as pervasive and

Nevertheless, government compulsion of a periodic payment to a system based on principles antithetical to religious tenets, which operates to provide financial assistance to sect members in direct conflict with established church doctrine also creates an unavoidable conflict with religious autonomy. The sect must either abandon its beliefs by contributing to the System or illegally refuse to participate.

According to the free exercise test articulated in Yoder, supra , the state may justify interference with religious freedom only upon a showing of a compelling state interest. In this area, "[o]nly the gravest abuses, endangering paramount interest, give occasions for permissible limitation." Sherbert v. Verner, supra, 374 U.S. at 406. The Supreme Court has, for example, permitted the State to infringe religious freedom to prevent certain widely recognized harms. L. Tribe, American Constitutional Law, supra, at 857; see e.g., Prince v. Massachusetts, 321 U.S. 158 (1944) (child labor). The state cannot, however, base any intrusion on mere administrative convenience See Sherbert v. Verner, supra (requiring elimination of certain restrictions on collecting unemployment compensation). Nor can it "impose its ideal of the 'best possible life' as a way of justifying intrusion upon the religious autonomy of a citizen." L. Tribe, American Constitutional Law, supra, at 857. Perhaps the greatest evidence of the enormous burden carried by the state in this regard is that, in Yoder, even state educational practices, which "rank at the very apex of the function of a state", Wisconsin v. Yoder, supra, at 213 failed to justify interference with Amish religious practices. Id.

The state interests in compelling participation in the social security system appear limited to possible improvement of the financial status of the Social Security Trust Fund and expanding the number of elderly with at least some guaranteed financial resources. While Congress could defend either objective as sound public policy promoting the general welfare, neither rises to the level of paramount or "compelling" interest necessary to justify an encroachment upon religious freedom. Accordingly, the compulsory participation plan would probably fail to survive the hypothesized free exercise challenge, assuming once again that it was based on a faith "central" and "sincerely held."

Accordingly a proposal compelling participation in the social security system could violate the free exercise clause of the First Amendment by compelling the participation of sects with legitimate religious tenets antithetical to the bases of the System. Congress could, of course, adopt a plan to cover most not-for-profit organizations, including religious organizations, provided it included an exemption similar to I.R.C. § 1402(g), supra, for the few religious organizations with conflicting religious views. This change would reverse the blanket exclusion of the current program while respecting religious freedom.

Prepared by Norman Dorsen, Professor of Constitutional Law, School of Law, Columbia University.

The CHAIRMAN. That very point has been made by a number of the witnesses.

Mr. MYERS. So, the matter was considered. Maybe some of the witnesses might disagree. As one said, you can get differing legal opinions on questions.

One thing that I am very much concerned about in S. 2099 is delaying coverage for charitable and educational organizations which are affiliated with a religious organization. As you mentioned, this term is quite indefinite, and "affiliation" can be a very vague thing. There might be very little financial control, or very little financing by the religious denomination. For example, many hospitals at one time or another might have been started by a religious organization, but they really are not like an actual congregation or a church-related school.

One thing that I suggest is that, at most, only those religious organizations should be delayed or exempt which have well-established religious principles and tenets against participating in any form of public insurance for both themselves and their employees. Such exemption should apply only to employees of the religious organization and employees of affiliated charitable and educational organizations which are wholly owned thereby and which serve only members of such religious denominations and their immediate families.

The CHAIRMAN. Can you identify that group? I mean, is that group easily identifiable?

Mr. MYERS. I think that it would be. Certainly some like the religious schools could be, and I think there would be very few hospitals that could meet that definition.

Coming to other possible solutions, I very much like the one that you mentioned—that with respect to any church body that opts out and also meets certain other standards, its employees should be considered to be like ministers, except that I believe they should be covered compulsorily.

One of the witnesses mentioned that this would not be desirable, because many of these people thought they did not need the protection, and that they were really just serving the church on a voluntary basis and not getting much money for it. If so, they should not miss that part of the money that would represent the social security taxes, if they are not concerned about the money in connection with their work.

Of course, as you know, no church would be taxed if it did not have employees to whom it paid a salary.

The CHAIRMAN. I think Mr. Montgomery had a couple of variations of that, too.

What was your No. 3, Mr. Montgomery?

Mr. MONTGOMERY. Can you hear me, Mr. Chairman?

The CHAIRMAN. Sure.

Mr. MONTGOMERY. I suggested that they make coverage of church employees optional, and in the absence of an election be the church to cover its employees, to treat those employees as self-employed for social security tax purposes. So one way or the other, they would be covered.

Mr. MYERS. I think that would be a good solution as long as they would be covered one way or the other.

One of the other witnesses suggested that same sort of an option, but said that the employees individually should have an option. Because, generally speaking, nobody else has an option individually to get in or out, it should not be given to these people.

As far as pastors of churches are concerned, I think that is a different matter. Under present law, the pastor can opt out on grounds of religious principle or conscience. But I think that theologically that same principle should not apply to laymen.

The CHAIRMAN. Are there any other suggestions you have?

Mr. MYERS. I have heard the various presentations, and different people have had different ideas. But I say that probably the most fruitful one would be what we have just discussed—that if a religious organization, defining the term rather tightly, has principles or conscience against participation in a public insurance system, it can opt out as far as being an employer is concerned. But under those circumstances, its employees would be considered to be self-employed persons, covered on a mandatory basis.

As you will recall, this is exactly what is done for American citizens who are employed by foreign embassies here in Washington or by international organizations like the United Nations or the Organization of American States. In those cases, the U.S. Government cannot tax the foreign government, but the law does define the employees thereof as being self-employed; because they have to pay income tax, therefore the information can be obtained. The same thing could be done for employees of these particular churches that have grounds of religious principle or conscience against participating in a public insurance system.

The CHAIRMAN. I think Mr. Clayton pointed out that we do discriminate against a certain group here, and we have made exceptions in the law in three other places; so we are not being consistent. I don't know if you remember his testimony or not.

Mr. MYERS. Yes.

The CHAIRMAN. I wouldn't say it's not accurate, but do you agree with that?

Mr. MYERS. There are places where the Social Security Act had recognized religious principles—as, for example, in the so-called Amish provision for the self-employed. We do the same thing for ministers, and there is also a provision for——

The CHAIRMAN. And for religious orders.

Mr. MYERS. And the third one is for members of religious orders who have taken a vow of poverty.

So, there could be special treatment that I think would be equitable.

The CHAIRMAN. Well, we had a special provision for those who had taken the vow of poverty.

Mr. MYERS. Yes. The special provision applies to those who have taken a vow of poverty. Since they have taken a vow of poverty, they obviously have no income. It is provided that the religious order can cover all of them—and all of its lay employees as well—and put a certain value for the room, board, and other subsistence furnished to them, and pay the combined employer-employee tax on such value. It is a mandatory election, and once made it is irrevocable. Many religious orders have done this, and it seems to be working out quite satisfactorily.

The CHAIRMAN. That is known in my State as the Sister Evangeline amendment. I don't know how it is known in other States.

Is there anything else you would like to add, Mr. Myers? Your statement will be made a part of the record.

Mr. MYERS. Mr. Chairman, I think that covers about everything that I would like to say. I do have the fear that an amendment that has a 2-year period just might go on and on. Of course, some of the witnesses said they would not be concerned if the Jepsen amendment were infinite.

I think that it would be much better, as you suggested, for this problem to be solved fairly quickly in the new year.

I think that the suggestion which we have all been talking about here at the end is an equitable solution for all parties involved.

The CHAIRMAN. Well, it seems to me that it may be something that if we can work it out, we can do very quickly. I just have a feeling that we are not going to have much success with a 2-year delay. Now, I may be totally wrong; there may be a lot of support for that.

If there is some way to resolve it, Senator Jepsen can modify his amendment so it will still be the Jepsen amendment.

Mr. MYERS. I see the basic problems as being the 2-year delay and the very loose definition of a charitable or educational organization that is affiliated with a religious organization. The word affiliated is a very loose word.

The CHAIRMAN. Well, I wonder if we might do this, just a suggestion, because it is now mid-December: If those who testified could designate one or two to work with our staff—we will get Mr. Myers to volunteer, since he was the executive director of the Commission, and maybe someone from Senator Jepsen's staff—we will see if we can work something out. We might be able to announce by the first of the year that we are in agreement. That might keep the marshals away for a while.

Who would be the one in the other group? Senator Jepsen's staff is represented, I know.

Yes, Mr. Montgomery.

Mr. MONTGOMERY. I would suggest, Mr. Chairman, that I would be happy to volunteer, and if we could solve this on January 24th, I would be delighted.

The CHAIRMAN. Well, rather than try to limit the group, I——

Mr. MONTGOMERY. Well, I am assuming that Congress has to come back to act on it.

The CHAIRMAN. No, no. We can work it out.

Mr. MONTGOMERY. But doesn't Congress have to repeal the existing law, Mr. Chairman?

The CHAIRMAN. Yes. I mean, I don't think we would come back in December—not that we aren't willing; don't misunderstand me. [Laughter.]

I know a lot of members would like to come back.

But we could take care of it, couldn't we, Bob? As I think one witness indicated, there won't be any real impact until—when? The end of the first quarter?

Mr. MYERS. Really, that is about when the impact would come. And any amendment could be retroactive to January 1, 1984.

The CHAIRMAN. Well, why don't I suggest that Carolyn Weaver on my staff work with Senator Jepsen's staff, and you know who to contact. We don't want to exclude anyone, because some may not agree with any change. Maybe you don't want to do anything. But the art of the possible is, I think, constructive.

Why don't we have a short meeting up here of the witnesses who think they have a problem, and for those who don't have a problem, the meeting is over.

Thank you very much.

[Whereupon, at 3:50 p.m., the hearing was adjourned.]

[By direction of the chairman the following communications were made a part of the hearing record:]

BY FRED SCHWANGEL

I am former member of Congress with strong convictions re separation of church and state.

The First Amendment requires that Congress make no law respecting an establishment of religion and the Supreme Court correctly pointed out that it is possible to take actions which are *respecting* an establishment of religion even if the act itself falls short of establishment.

Any definition of church by the Congress, at the very least, is an act respecting and, in all probability, is in itself an unconstitutional establishment of religion.

Let me explain. America's religious heritage is one of pluralism. The great diversity of religion in America makes it impossible to devise a definition of church which would fit all religious organizations. If, however, Congress attempts to draw up a definition it declares that all religious organizations which do not fit into the confines of that definition are not churches. In other words, Congress would have expressed a preference for a particular form of church. That is establishment of religion pure and simple. The Congress must not be led onto the slippery slope of deliberately violating the plain language of the Constitution.

I would like to suggest that you do nothing that even smacks of establishment. Leave it to the Federal courts to determine on a case-by-case basis whether an organization which claims to be a church is in fact a church. Do not make an unconstitutional attempt to define church.

I oppose the Jepson bill re definitions of church and it's dangerous precedent are not needed as a resolution of tax problems.

DEPARTMENT OF THE TREASURY
WASHINGTON, D.C. 20220

ASSISTANT SECRETARY

DEC 21 1983

Dear Mr. Chairman:

Enclosed is Treasury's statement for the record of your Committee's December 14 hearing on S. 2099, Senator Jepsen's bill to delay for two years the mandatory coverage under social security of employees of either religious organizations or affiliated charitable and educational organizations.

For the reasons explained in this statement, the Treasury Department opposes S. 2099. However, I am informed that following Wednesday's hearing, you arranged a meeting among members of your staff, representatives of various religious organizations which had testified at the hearing, and persons from the staffs of Senator Jepsen and other co-sponsors of S. 2099. The purpose of the meeting was to begin to work out an acceptable alternative to the coverage provisions of the Social Security Amendments of 1983 which would be amended by S. 2099. As we understand it, the preliminary outline of this compromise proposal would permit those churches which are fundamentally opposed to participation in the social security system to elect to treat all of their lay employees as self-employed, and to withhold the entire amount of SECA tax from these workers' wages. We understand that this solution would avoid these churches' opposition to paying the employer portion of FICA taxes.

The Treasury Department understands the concerns of the various religious organizations which testified at the December 14 hearing. We would be most interested in working with the staff of your Committee and with representatives of the concerned religious organizations in developing the details of such a compromise proposal.

Sincerely,

John E. Chapoton
Assistant Secretary
(Tax Policy)

The Honorable
Robert Dole
Chairman, Senate Finance Committee
United States Senate
Washington, D.C. 20510

Enclosure

For Release Upon Delivery
Expected at 2:00 p.m. EST
December 14, 1983

STATEMENT FOR THE RECORD OF
JOHN E. CHAPOTON
ASSISTANT SECRETARY (TAX POLICY)
DEPARTMENT OF THE TREASURY
BEFORE THE
SENATE COMMITTEE ON FINANCE

Mr. Chairman and Members of the Committee:

I appreciate the opportunity to submit for the record the Treasury Department's views on S. 2099, which would delay for two years the mandatory coverage under social security of employees of either religious organizations or affiliated charitable and educational organizations. The Treasury Department opposes S. 2099.

Background:

The Social Security Amendments of 1983 ("the Amendments") extended social security coverage and taxes on a mandatory basis to all lay employees of nonprofit organizations as of January 1, 1984. In recognition of the fact that some of these nonprofit organization employees, newly covered under social security, would be nearing retirement and thus might not work in covered status long enough to be insured for benefits, Congress also provided special insured status rules for those employees age 55 or older as of January 1, 1984. Finally, the Amendments also eliminated the existing provisions permitting nonprofit organizations to withdraw from the social security system effective April 1, 1983.

The Amendments did not affect the treatment for social security purposes of ministers and members of religious orders, who since 1954 have been covered by social security as self-employed professionals on a voluntary basis, by individual election. Since 1967, all ministers and members of religious orders have had the opportunity to elect out of the social security system by filing an irrevocable withdrawal election within the first two years of beginning the performance of their religious duties. According to Social Security Administration data, as of 1980 approximately 225,000 members of the clergy were covered, while 21,000 had claimed an exemption from coverage.

Prior to enactment of the Amendments, participation in the social security system was optional for nonprofit organizations (whether religious, charitable or educational). Many such organizations have chosen to participate, but as of the beginning of 1983, approximately 15 percent of employees of nonprofit organizations were not covered. Moreover, any nonprofit organization which had elected to participate could apply to withdraw from social security after it had been in the system for eight years, with termination being effective two years after the end of the calendar quarter in which the withdrawal notice was filed. Thus it was possible under prior law for a nonprofit organization to join the system, pay and withhold social security tax on its employees' wages for the ten-year maximum prerequisite for acquiring social security insured status, and then withdraw from the system. Under any such system of voluntary coverage, persons electing coverage (or working for organizations which can elect in and out of coverage) tend to be those who could expect to receive benefits representing large returns on their contributions. This tends to increase the cost of the program at the expense of all those who are mandatorily covered.

Last year, during its examination of the social security program, including its financial difficulties, the bipartisan National Commission on Social Security Reform ("the Commission") focussed specifically on the problem caused by the fact that relatively large social security benefits can accrue to individuals who become eligible for Old Age, Survivors and Disability Insurance (OASDI) benefits as a result of spending relatively short periods in covered employment. A set of related recommendations therefore was developed (1) to provide mandatory coverage of nonprofit organization employees and new federal workers, (2) to prohibit state and local governments from terminating coverage, and (3) to eliminate "windfall" benefits for persons who spend part of their working lives in noncovered employment. In making these recommendations, the Commission sought on the one hand to reduce the ability of certain groups to take unfair advantage of the social security system by electing in and out of coverage, and on the other hand to eliminate

the "windfall portion" of benefits received by certain persons becoming eligible after 1985 for both social security benefits and and a pension based on work not covered under social security. In enacting the Commission's recommendation to extend mandatory coverage to nonprofit organization employees, as well as the related recommendations, Congress recognized that these efforts to establish a more nearly universal system of mandatory social security coverage, the costs of which are equitably shared by all workers, would be a significant step towards restoring the financial soundness of the social security system.

S.2099

S. 2099 would delay until January 1, 1986 the mandatory social security coverage of lay employees both of religious organizations and of any charitable or educational organization which is affiliated with a religious organization. A corresponding two-year delay would be provided in the requirements providing sliding-scale entitlements to social security benefits for employees age 55 or older as of the first day of mandatory coverage. S. 2099 would have no effect on the provision of the Amendments which eliminated the ability of nonprofit organizations to terminate social security coverage after March 31, 1983.

It is important to recognize that S. 2099 also would have no effect upon the above-described voluntary coverage under the social security system of ministers and members of religious orders. Indeed, there has been no suggestion that the current ability of ministers to elect out of the social security system be changed.

In introducing S. 2099 on November 15, Senator Jepsen stated that when Congress decided to extend mandatory social security coverage to all tax-exempt organizations, "the special protection given to religious activity under the first amendment [was] not adequately examined." He therefore recommended this "short [two-year] delay in order to thoroughly examine this constitutional question." Cong. Rec. S16201 (Nov. 15, 1983).

In response to Senator Jepsen's statement that the constitutionality of this provision was not studied thoroughly enough, we wish to point out that both the National Commission on Social Security Reform and one of its predecessors, the Universal Social Security Coverage Study Group, in fact had examined this issue in considerable detail. Robert J. Myers, the Executive Director of the National Commission, prepared for all Commission members a memorandum on the single issue of the constitutionality of

prohibiting withdrawal of nonprofit (including religious) organizations which previously had elected social security coverage, in which he concluded that "[t]here seems to be no question that Congress has the authority to compel such organizations to participate in the Social Security program, with the possible exception of organizations operated by sects 'with sincere religious tenets antithetical to participation....'" See Commission Staff Memorandum No. 34 at 1 (July 1, 1982). In this memorandum, Mr. Myers also referred to a lengthy opinion letter prepared by Professor Norman Dorsen in 1980 for the Universal Social Security Coverage Study Group, on the broader issue of the constitutionality of imposing mandatory social security coverage on employees of religious organizations. Both that opinion letter and the report filed by the Study Group itself conclude that, although legislation providing such mandatory coverage "would probably be challenged in the courts, ... the challengers are unlikely to be successful," particularly if the statute provides exemptions for conscientious objectors similar to the rules currently provided in Code section 1402(g). See Report of the Universal Social Security Coverage Study Group, Joint Committee Print, House Committee on Ways and Means, WMCP:96-54 at 259 (March 27, 1980).

However, we recognize that the principal focus of this hearing is upon the constitutionality of extending mandatory coverage to employees of religious organizations. Accordingly, the Justice Department will submit for this Committee's review a written discussion of the constitutional issues raised by this provision of the Amendments as it applies to religious organizations. After submitting its analysis, the Justice Department of course will remain available to respond to any additional questions which this Committee may have in reviewing this constitutional question.

Apart from these issues concerning the constitutionality of this provision, the Treasury Department opposes S. 2099 for several additional reasons, related not only to the delayed effect upon the retirement security of those workers whom Congress would be failing to cover, but also to the immediate impact on the social security system of postponing both taxation and coverage for all of these religious organization employees.

First, we urge this Committee to consider the adverse effect which this bill would have on the retirement, survivors and disability protection of those workers whose coverage would be delayed. Employees of religious nonprofit organizations and their affiliated charitable and educational institutions need social security protection no less than other workers. We note again that, as of 1983, approximately 85 percent of all nonprofit organization employees work for organizations which have already elected to

participate in the social security system. However, the remaining 15 percent of employees who still have not acquired insured status may have little or no protection under a pension plan, and often have relatively low earnings. Such employees may find it financially difficult, if not impossible, to provide for their own protection.

Next, and perhaps more importantly, we are concerned about the immediate revenue impact of S. 2099 on the social security trust funds. Because this bill would apply not only to religious organizations, but also to "affiliated" charitable or educational organizations, it could result in the exclusion from coverage of employees of nonprofit organizations which are so tenuously affiliated with religious organizations that no viable constitutional objection to coverage would ever arise. For example, a university or a hospital potentially could be exempted from coverage by S. 2099 because of an "affiliation" based on name only, without regard to management, control or funding by a bona fide religious organization. This lack of an adequate definition of "affiliation," in combination with imprecise data on the relative numbers of "religious" as opposed to secular charitable organizations, has made it difficult to prepare precise revenue estimates for S. 2099. We estimate, however, that the revenue loss from S. 2099 would be $400 million in 1984, $600 million in 1985, and $100 million in 1986, or $1.1 billion total. This represents nearly half of the $2.3 billion which Congress expected to raise over the same two years by extending coverage uniformly to employees of all those nonprofit organizations which previously had not been covered by social security.

The Treasury Department also is very troubled by the potential threat to the stability of the entire social security package that is created by S. 2099, or any other amendment to this bipartisan compromise. In signing the Amendments on April 20, President Reagan characterized the spirit of cooperation which generated this legislation when he said, "In this compromise we have struck the best possible balance between the taxes we pay and the benefits paid back. . . . None of us here today would pretend that this bill is perfect. Each of us had to compromise one way or another. But the essence of bi-partisanship is to give up a little in order to get a lot."

Any amendments to such a tightly-knit compromise threaten to unravel the entire piece of legislation. For example, in addition to S. 2099, other proposals have been introduced following passage of the Amendments to change the formula for taxing a portion of social security benefits, to delay coverage of federal judges and new federal employees, and to reduce the tax rates applicable to self-employed persons. Any one change to the Amendments is likely to be expanded to include many more special-interest provisions, thereby significantly reducing both the fairness of the social security package, and the revenues which it is expected to raise.

To conclude, we oppose enactment of S. 2099 because we believe that the bill would hinder the social security system's ability both to protect employees of nonprofit organizations who would not otherwise be covered by social security, and to tax those employees of nonprofit organizations who might otherwise attempt to work in covered employment for only the minimum number of years necessary to acquire insured status. We are troubled also about the $1.1 billion dollar revenue loss estimated for this particular bill. Finally, we are concerned that passage of this amendment in turn would trigger many other amendments to the compromise bipartisan package, and accordingly would threaten the delicate fiscal balance of the entire social security system.

STATEMENT FOR THE RECORD
OF
MARTHA A. MCSTEEN
ACTING COMMISSIONER OF SOCIAL SECURITY

HEARING ON S. 2099

COMMITTEE ON FINANCE
UNITED STATES SENATE

DECEMBER 14, 1983

MR. CHAIRMAN AND MEMBERS OF THE COMMITTEE:

I APPRECIATE THE OPPORTUNITY TO SUBMIT THE FOLLOWING STATEMENT TO YOUR COMMITTEE IN CONNECTION WITH ITS CONSIDERATION OF S. 2099 WHICH WOULD DELAY FOR 2 YEARS SOCIAL SECURITY COVERAGE OF EMPLOYEES OF RELIGIOUS NONPROFIT ORGANIZATIONS. THE STATEMENT DISCUSSES THE CHANGES MADE BY THE SOCIAL SECURITY AMENDMENTS OF 1983 IN THE PROVISIONS FOR COVERING EMPLOYEES OF NONPROFIT ORGANIZATIONS AND THE PROBLEMS THAT WE THINK WOULD ARISE IF S. 2099 WERE ENACTED.

THE ADMINISTRATION OPPOSES THE ENACTMENT OF S. 2099. COVERAGE FOR EMPLOYEES OF ALL NONPROFIT ORGANIZATIONS WAS AN IMPORTANT PART OF THE BIPARTISAN AGREEMENT WHICH CULMINATED IN THE PASSAGE OF THE 1983 AMENDMENTS. THE PROVISION WAS RECOMMENDED BY THE NATIONAL COMMISSION ON SOCIAL SECURITY REFORM AND WAS ADOPTED BY BOTH HOUSES OF CONGRESS WITH VIRTUALLY NO CHANGE.

AS PRESIDENT REAGAN POINTED OUT WHEN HE SIGNED THE AMENDMENTS: "NONE OF US HERE TODAY WOULD PRETEND THAT THIS BILL IS PERFECT. EACH OF US HAD TO COMPROMISE ONE WAY OR ANOTHER. BUT THE ESSENCE OF BI-PARTISANSHIP IS TO GIVE UP A LITTLE IN ORDER TO GET A LOT."

COMPROMISE BY BOTH SIDES MADE POSSIBLE THIS LANDMARK LEGISLATION WHICH PRESERVES THE SOCIAL SECURITY TRUST FUNDS AND ASSURES THE CONTINUED PROTECTION OF ALL WHO WORK OR RECEIVE BENEFITS UNDER THE SOCIAL SECURITY SYSTEM. ENACTMENT OF S. 2099 WOULD UNDERMINE THAT BIPARTISAN AGREEMENT AND COULD LEAD TO AN ATTACK ON OTHER PROVISIONS OF THE 1983 AMENDMENTS.

THE SOCIAL SECURITY AMENDMENTS OF 1983 PROVIDED SOCIAL SECURITY COVERAGE BEGINNING IN JANUARY 1984 OF ALL CURRENT AND FUTURE EMPLOYEES OF NONPROFIT ORGANIZATIONS. THE AMENDMENTS ALSO ELIMINATED THE OPTION ALLOWING NONPROFIT ORGANIZATIONS TO TERMINATE SOCIAL SECURITY COVERAGE.

IN RECOGNITION OF THE FACT THAT SOME NONPROFIT ORGANIZATION EMPLOYEES NEWLY COVERED UNDER SOCIAL SECURITY WOULD BE NEARING RETIREMENT AND MIGHT NOT WORK LONG ENOUGH UNDER SOCIAL SECURITY TO BE INSURED FOR BENEFITS, CONGRESS PROVIDED SPECIAL INSURED STATUS RULES FOR THOSE AGED 55 AND OVER AS OF JANUARY 1, 1984.

THE 1983 AMENDMENTS APPLY ONLY TO THE SOCIAL SECURITY COVERAGE OF LAY EMPLOYEES OF NONPROFIT ORGANIZATIONS; THE AMENDMENTS DID NOT CHANGE THE WAY MINISTERS AND MEMBERS OF RELIGIOUS ORDERS ARE COVERED UNDER SOCIAL SECURITY. THESE WORKERS ARE STILL COVERED UNDER SOCIAL SECURITY ON A VOLUNTARY BASIS AND ARE NOT TREATED AS EMPLOYEES OF NONPROFIT ORGANIZATIONS.

MINISTERS AND MEMBERS OF RELIGIOUS ORDERS NOT UNDER A VOW OF POVERTY ARE COVERED AS SELF-EMPLOYED PERSONS ON AN INDIVIDUAL VOLUNTARY BASIS, AND MEMBERS OF RELIGIOUS ORDERS UNDER A VOW OF POVERTY ARE COVERED AS EMPLOYEES AT THE OPTION OF THE ORDER. THUS, IN RECOGNITION OF THEIR SPECIAL STATUS, COVERAGE IS NOT COMPULSORY FOR THOSE WORKERS WHO PERFORM RELIGIOUS FUNCTIONS FOR A RELIGIOUS NONPROFIT ORGANIZATION.

S. 2099, INTRODUCED BY SENATOR JEPSEN ON NOVEMBER 15, WOULD DELAY FOR 2 YEARS--UNTIL JANUARY 1986--THE SOCIAL SECURITY COVERAGE OF EMPLOYEES OF RELIGIOUS NONPROFIT ORGANIZATIONS. THE BILL WOULD ALSO DELAY SOCIAL SECURITY COVERAGE FOR THE EMPLOYEES OF CHARITABLE OR EDUCATIONAL ORGANIZATIONS AFFILIATED WITH RELIGIOUS ORGANIZATIONS. IN THE CASE OF EMPLOYEES OF ORGANIZATIONS WHOSE COVERAGE UNDER SOCIAL SECURITY WAS DELAYED BY THE BILL, IT WOULD PROVIDE THAT THE MORE LENIENT REQUIREMENTS FOR ENTITLEMENT TO SOCIAL SECURITY BENEFITS WOULD APPLY TO EMPLOYEES AGED 55 OR OLDER ON JANUARY 1, 1986.

THE BILL WOULD HAVE NO EFFECT ON THE PROVISION OF THE 1983 AMENDMENTS WHICH ELIMINATED THE OPTION ALLOWING NONPROFIT ORGANIZATIONS TO TERMINATE SOCIAL SECURITY COVERAGE.

S. 2099 WOULD CREATE AN UNDESIRABLE PRECEDENT BECAUSE OTHER NONPROFIT ORGANIZATIONS COULD WELL REQUEST A DELAY IN COVERAGE ON

THE GROUNDS THAT THEY DESERVE THE SAME TREATMENT AS RELIGIOUS NONPROFIT ORGANIZATIONS AND NEED A DELAY IN VIEW OF THE PROBLEMS THEY WILL HAVE IN PAYING THE SOCIAL SECURITY TAXES. IT IS ALSO POSSIBLE THAT OTHER NEWLY COVERED GROUPS, SUCH AS FEDERAL EMPLOYEES, WOULD ARGUE THAT IT WOULD BE UNFAIR TO DELAY COVERAGE OF JUST ONE GROUP.

S. 2099 WOULD HAVE A SERIOUS ADVERSE EFFECT ON THE SOCIAL SECURITY TRUST FUNDS. THE REVENUE LOST BY DELAYING COVERAGE OF EMPLOYEES OF RELIGIOUS NONPROFIT INSTITUTIONS IS ESTIMATED TO BE $500 MILLION IN EACH OF THE 7 YEARS OR $1 BILLION TOTAL, FOR THE OLD AGE, SURVIVORS AND DISABILITY INSURANCE (OASDI) TRUST FUNDS AND THE HOSPITAL INSURANCE TRUST FUND, COMBINED. IF COVERAGE WERE DELAYED FOR ALL EMPLOYEES OF NONPROFIT ORGANIZATIONS TO WHOM COVERAGE WAS EXTENDED UNDER THE 1983 AMENDMENTS, THE LOST REVENUES WOULD TOTAL $2.3 BILLION.

THE BILL WOULD ALSO HAVE AN ADVERSE EFFECT ON THE RETIREMENT, SURVIVORS AND DISABILITY PROTECTION OF WORKERS WHOSE COVERAGE WOULD BE DELAYED. EMPLOYEES OF RELIGIOUS NONPROFIT ORGANIZATIONS AND THEIR AFFILIATED CHARITABLE AND EDUCATIONAL INSTITUTIONS NEED SOCIAL SECURITY PROTECTION NO LESS THAN OTHER WORKERS. SUCH EMPLOYEES MAY HAVE LITTLE OR NO PROTECTION UNDER A PENSION PLAN, AND OFTEN HAVE RELATIVELY LOW EARNINGS AND SO MAY

FIND IT FINANCIALLY DIFFICULT OR IMPOSSIBLE TO PROVIDE FOR THEIR OWN PROTECTION.

SENATOR JEPSEN INDICATED WHEN HE INTRODUCED S. 2099 THAT HIS PRIMARY CONCERN WITH EXTENDING COVERAGE TO EMPLOYEES OF RELIGIOUS ORGANIZATIONS WAS THAT THE CONSTITUTIONALITY OF SUCH A PROVISION HAD NOT BEEN PROPERLY ADDRESSED. THE NATIONAL COMMISSION ON SOCIAL SECURITY REFORM, WHOSE RECOMMENDATIONS FORMED THE BASIS FOR THE 1983 AMENDMENTS, CONSIDERED THE CONSTITUTIONAL QUESTION AND DECIDED TO RECOMMEND COVERAGE OF EMPLOYEES OF NONPROFIT ORGANIZATIONS. MOREOVER, BOTH YOUR COMMITTEE AND THE COMMITTEE ON WAYS AND MEANS HELD EXTENSIVE PUBLIC HEARINGS ON THE RECOMMENDATIONS OF THE COMMISSION.

WE DO NOT THINK DELAYING COVERAGE FOR 2 YEARS WILL HAVE ANY APPRECIABLE EFFECT IN RESOLVING THIS CONSTITUTIONAL ISSUE SINCE IF THERE IS ANY CONSTITUTIONAL CHALLENGE TO MANDATORY COVERAGE IT WILL ULTIMATELY HAVE TO BE DECIDED BY THE COURTS.

FINALLY, THE BILL WOULD APPLY TO "RELIGIOUS OR APOSTOLIC" NONPROFIT ORGANIZATIONS AND TO NONPROFIT ORGANIZATIONS "AFFILIATED" WITH RELIGIOUS ORGANIZATIONS. WE THINK THAT THE EFFECT OF THE LANGUAGE WOULD BE TO EXCLUDE FROM COVERAGE EMPLOYEES OF NONPROFIT ORGANIZATIONS IN CASES WHERE NO CONSTITUTIONAL ISSUE WOULD ARISE BECAUSE THE AFFILIATION WITH RELIGIOUS ORGANIZATIONS

IS SO TENUOUS. FOR EXAMPLE, A UNIVERSITY OR A HOSPITAL COULD BE LOOSELY AFFILIATED WITH A RELIGIOUS ORGANIZATION, BUT THE RELIGIOUS ORGANIZATION MAY PROVIDE NO MANAGEMENT, CONTROL OR FUNDING TO THE UNIVERSITY OR HOSPITAL.

IN SUMMARY, WE OPPOSE ENACTMENT OF S. 2099 BECAUSE IT WOULD UNDERMINE THE BIPARTISAN AGREEMENT THAT LED TO THE ENACTMENT OF THE 1983 AMENDMENTS, CREATE A PRECEDENT FOR OTHER NEWLY-COVERED GROUPS TO REQUEST A DELAY IN COVERAGE, SUBSTANTIALLY REDUCE TRUST FUND REVENUES AND INCREASE THE LIKELIHOOD OF TRIGGERING THE STABILIZER PROVISION, AND HAVE AN ADVERSE EFFECT ON THE PROTECTION OF EMPLOYEES OF NONPROFIT ORGANIZATIONS.

30-336 O—84——11

BAPTIST JOINT COMMITTEE ON PUBLIC AFFAIRS
200 MARYLAND AVENUE, N.E., WASHINGTON, D. C. 20002-5797 202/544-4226

JAMES M. DUNN
EXECUTIVE DIRECTOR

STATEMENT OF THE BAPTIST JOINT COMMITTEE ON PUBLIC AFFAIRS

on

SOCIAL SECURITY AMENDMENTS OF 1983

to the

COMMITTEE ON FINANCE
UNITED STATES SENATE

December 19, 1983

The Baptist Joint Committee on Public Affairs is composed of representatives from eight national cooperating Baptist conventions and conferences in the United States. They are: American Baptist Churches in the U.S.A.; Baptist General Conference; National Baptist Convention of America; National Baptist Convention, U.S.A., Inc.; North American Baptist Conference; Progressive National Baptist Convention, Inc.; Seventh Day Baptist General Conference; and Southern Baptist Convention. These groups have a current membership of nearly 30 million.

Through a concerted witness in public affairs, the Baptist Joint Committee seeks to give corporate and visible expression to the voluntariness of religious faith, the free exercise of religion, the interdependence of religious liberty with all human rights, and the relevance of Christian concerns to the life of the nation. Because of the congregational autonomy of individual

Baptist churches, we do not purport to speak for all Baptists.

The Baptist Joint Committee on Public Affairs has a long-standing position that the religion clauses of the First Amendment to the Constitution of the United States, which were made applicable to the states by the Fourteenth Amendment, prohibit government from taxing churches through ad valorem or any other tax which may be subject to unfair manipulation. But we have also held that: (1) uniform, nondiscriminatory taxes may be levied on churches without offending the religion clauses, and (2) if government decides to place a broad class of not-for-profit organizations in a tax-exempt category it cannot deny churches admission to that class simply because they are religious. The government may neither advance nor inhibit religion.

With these understandings we would like to address specifically the church-state problems which some people see in the Social Security Amendments of 1983 when those Amendments require all nonprofit organizations to participate in the Social Security system. We do not see that a church-state problem exists in this instance.

Even though FICA funds are collected by the Internal Revenue Service, those funds cannot logically be conceived of as a tax either on the employer or the employee. Black's Law Dictionary, 5th ed., defines a tax as "pecuniary contribution . . . made by the persons liable, for the support of government." FICA funds do not go to the support of the government. They go into a separate fund for the exclusive purpose of providing social

protection for the elderly, the disabled, and survivors. We do not see the Social Security Amendments of 1983 as a tax on churches *per se*.

Some argue that the government, by requiring a church to match the contributions of its employees, is requiring that church to spend a portion of its funds in the way the government wants. The church, under these Amendments, would not have total control over the allocation of its funds for its religious ministry. However, the extent of government control over a church's funds would appear to be *de minimis* and the Constitution does not require that there be no contact between church and state.

The major fear that some of our constituency have is that even though the collection of FICA funds is not a tax on churches, such collection may be perceived as a tax. They believe that if they do not voice their objection at this time their silence may be taken as acquiescence to the claim that the state may tax the church. They see the Social Security Amendments of 1983 as a potential precedent which later lawmakers will use as a stepping-stone to tax churches. They are well aware of John Marshall's often misquoted statement, "The power to tax involves the power to destroy." To ease the fear that the Social Security Amendments of 1983 might be considered a precedent for taxation of churches, it would be helpful if this Committee would state clearly and unequivocally in the report of these hearings that the intent of the Amendments *is not* to establish such a precedent.

All not-for-profit organizations have an obligation to look after the welfare of their employees. We see no constitutional impediment to requiring that churches pay their portion of this insurance program so long as ministers and members of religious orders retain the right to opt out of the program on the basis of religious beliefs.

James M. Dunn

Hobe Sound Bible College

P. O. Box 1065, Hobe Sound, Florida 33455 (305) 546-5534

January 2, 1984

TO: Senate Finance Committee
Robert J. Dole, Chairman

SUBJECT: December 14, 1983 on Social Security coverage for employees of religious organizations.

I am writing to voice our concerns with the new Social Security law as it affects religious organizations.

(1) Its financial impact upon those of us who have never participated in Social Security. It will cost us $30,000 a year and our employees $30,000. We have basically "broken even" financially over our 20 years of operation. The additional $30,000 will be devastating to us. We already have a private retirement plan.

(2) Churches will now pay Social Security on its employees and we therefore have taxation of churches which is unconstitutional.

With relationship to (1) above we could live with Social Security if they would allow us to just pick up new employees and thus phase-in the cost over a period of time to make it affordable to non-profits. Federal employees were given this phase-in but NOT non-profits. Also, consideration should be given to those who already have a private retirement plan.

With respect to (2), churches should be given the choice as to be covered or not. We favor the Jepsen Amendment until a solution dealing with the above issues can be worked out.

Thank you for your consideration.

Sincerely,

James H. Olsen

JHO/r

WRITTEN STATEMENT OF KERRY LEE MORGAN, ATTORNEY
BEFORE THE COMMITTEE ON FINANCE, UNITED STATES SENATE
ON SOCIAL SECURITY COVERAGE FOR EMPLOYEES
OF RELIGIOUS ORGANIZATIONS. DECEMBER 14, 1983

Mr. Chairman and Committee Members:

My name is Kerry Lee Morgan and I am an attorney. As with all attorneys, there exists an obligation to support the Constitution of the United States. The same is true of congressmen. I am sure that the Committee members are aware of their own obligation in this respect, but may not be aware of the ramifications of that obligation with respect to the inclusion of religious employees and employers under Social Security as of January 1, 1984.

An obligation to uphold the Constituion, means to uphold the written Constitution as the fixed law of the land. Such an obligation does not necessarily mean to uphold its interpretations. It only means that unless those interpretations accurately reveal the Constitution's fixed meaning, then the Constitution itself, rather than its interpretation are to be upheld.

By enacting a Social Security Amendment which forced religious employees and employers under that system, Congress altered the Constitutional relationship between religion and the state as it had been previously understood.

The previous understanding is, of course, that the tax exemption is Constitutional because it has been that way for

around two hundred years. It was also that way when the Constitution was adopted by the founding fathers. With respect to social security, mandatory taxation of religious entities has been rejected every year it has been suggested. Until 1983, it was rejected consistently. It was rejected in 1935. It was rejected in 1939. It was rejected in 1945 and 46. It was also rejected in 1949 and 1950. Let's be clear on this point; the presumption rests with this Congress to show conclusively that the social security amendment in question is Constitutional, rather than the religious entities demonstrating that it is not. The moving party carries the burden and Congress is the moving party in this controversy. This is not a matter of debate unless the obligation to uphold the Constitution is merely rhetoric and hollow.

A look at the evidence Congress has presented to establish the Constitutionality of the 1983 Amendments is interesting.

First, it has been suggested that religion is just a business. There are employers and employees. They carry on commercial transactions and can sue and be sued. The social security tax, it is reasoned, is not on religion but rather on the business which the religious 'enterprize' engages in. Thus the non-profit religious organizations should be treated and taxed like any other business.

This reasoning is inconsistent with the treatment of religious entities Constitutionally. The Constitution disestablished religion, but according to this thinking it does not disestablish religious businesses.

For instance, who can object when someone suggests that a few government dollars go to support one of these 'businesses'? It certainly cannot be that such diversion of funds would be an establishment of religion; how could it? The church down the street is just a business, remember? If religion is just a business, then who can object Constitutionally to saying a prayer in school to support the 501(C)(3)? Who could deny that reading from the corporation textbook when Congress is opened each day or quoting from that business textbook in a public school or even honoring that business' corporate founder with a nativity scene, would be Constiututionally impermissable?

The point is Congress cannot have it both ways. If religion is a business, then go ahead and tax it, but do not call it religion when you want to disestablish it. If it is not a business, the do not tax it like it was a business.

Second, it has also been suggested that Congress is looking for additional revenue from non-profit religious organizations which can keep the social security system stable and healthy. Since these entities handle money and transact business as already indicated, they are a sure bet as a potential 'source of revenue.'

But what does this mean for religious non-profit organizations? It means that to the degree government taxes the religious non-profit organizations, the social security system is dependent upon them. If it were not dependent upon them, why are they included? Dependence requires that government ensure the continued solvency of those religious entities via

control and regulation. Not only would such entanglements be an unconstitutional establishment, but a violation of free exercise as well.

Can it be seriously maintained that these entanglements can be limited or will stop short of destroying religious institutions? Some of you may have this sort of faith but our own Congressional history bears out the facts.

In the 1870's Congress permitted the District of Columbia's Board of Commissioners to tax church property. They wanted to insure a basic source of revenue from these non-profit businesses. By May of 1878 the "sources of revenue" were in fact owned by the Board of Commissioners, who became purchasers of them after a levy and tax sale. The government sought revenue and ended up owning the property, which is about as excessively entangled as one can get.

That particular Congress saw their error and in June of 1878 ordered that the property formerly held by these religious organizations, over 200 alone in the District of Columbia, be returned to the trustees of the church. It was further enacted that the tax liens illegally assessed be wiped out, and that refunds be given to churches which paid under protest. That Congress clearly understood that religious organizations and religious properties were not considered potential sources of any revenue. They also understood very clearly the nature of their obligation to uphold the Constitution, despite pressures to raise revenue.

The 1983 Congress was faced with the same choice. Like the Congress of 1870 they considered religious non-profit organ-

izations as a "business" and as a "source of revenue." Neither Congress carried the presumption of constitutionality and both were inconsistent with history and common sense. None of the evidence purporting to show that religion is a "business or source of revenue" is supported or permitted by the Constitution's fixed meaning. Indeed, when the document indicates that "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof...," it means religion. Where an oath to uphold the Constitution is involved, it means the written Constitution.

NEW COVENANT CHURCH at Cedar Hill

December 8, 1983

Senate Finance Committee
219 Dirksen Senate Office Building
Washington, D.C. 20510

Gentlemen:

I am writing this letter as a formal protest to the 1983 Social Security Act Amendment. This is a direct move by the government to tax churches in a mandatory fashion. It is a violation of the Constitution of the United States of America which was established for reasons that included religious liberty.

In 1934 the Social Security Act was passed by the federal government, it was then assured the church was exempt from the social security program.

In 1951, lobbyists for some clerics successfully pushed through a provision for churches to participate in the Social Security System voluntarily. I could accept it being voluntary.

Now, in 1983, the Social Security Act Amendment has added all non-profit organizations, which includes the church.

Now, the church is being taxed by the state. It is morally, biblically and constitutionally wrong for the federal government and its agencies, or any other government to tax monies given as an offering to God. Especially in a nation that is called the land of the free.

Social Security is not an insurance it is a tax! It must be paid whether the individual benefits from it or not. It goes into the coffers of the federal government. Notice IRS's form for the private contractor "Self Employment Tax."

I request that the church be exempted from this amendment.

I also request an answer from you regarding your personal stand and action on this critical constitutional matter.

Sincerely,

Ronald W. Ciccarone

1071 Bay Ridge Rd., Annapolis, Md. 21403 301·263·2992

SUMMARY STATEMENT
of
TEDD N. WILLIAMS
on behalf of
THE RUTHERFORD INSTITUTE
IN OPPOSITION TO SECTION 102
of the
SOCIAL SECURITY AMENDMENTS OF 1983
DECEMBER 14, 1983

Section 102 of the Social Security Amendments of 1983 imposes a tax on nonprofit organizations, including churches. Taxation of churches is a radical departure from historical precedent in the United States.

Many churches hold long standing beliefs that tithes and offerings belong to God alone and that God is not subject to taxation by the state. Such churches will be forced by their consciences to respectfully refuse to pay the tax.

Imposition of the tax will severely burden the free exercise of religion of such churches. Moreover, the tax will violate the establishment clause by breaking down the constitutional barrier between church and state. The government, for the first time in history, will derive funds directly from church budgets. Churches, as taxpayers, will be entitled to unrestricted participation in the mundane political processes, apart from their traditional roles as moral watchdogs.

The legislative history does not indicate that Congress was made aware of the serious constitutional implications of a tax upon churches. Neither is there any indication that Congress considered whether accommodation of the religious beliefs could be effected, so as to avoid constitutional problems without materially detracting from the purposes of the act. Congress should delay the effective date of Section 102 until these matters can be given in depth consideration.

STATEMENT OF
TEDD N. WILLIAMS
ON BEHALF OF
THE RUTHERFORD INSTITUTE
IN OPPOSITION TO SECTION 102 OF
THE SOCIAL SECURITY AMENDMENTS OF 1983
(PUBLIC LAW 98-21)
BEFORE THE UNITED STATES
SENATE FINANCE COMMITTEE
DECEMBER 14, 1983

I submit this statement on behalf of the Rutherford Institute. I am an attorney and serve as Executive Director of the Rutherford Institute, which is a legal and educational organization located in Woodbridge, Virginia. The Institute participates in litigation concerning free speech, freedom of religion and other constitutional issues. It represents a broad range of clients from Protestants to Roman Catholics to Orthodox Jews. The Institute also conducts research and publishes papers on constitutional topics and conducts conferences or seminars for professional and lay audiences.

THE SOCIAL SECURITY AMENDMENTS OF 1983:
Impact On Churches

In April 1983 President Reagan signed the Social Security Amendments of 1983 (Public Law 98-21) into law. The enactment effects sweeping changes in the Social Security law.

While the changes are numerous and complex,[1] my discussion will focus on the change wrought by Section 102 which extends social security coverage on a mandatory basis to all employees[2] of non-profit organizations, including churches, effective January 1, 1984.

By reason of this act churches will be required to pay a social security tax[3] computed as a percentage of the wages of their employees. Church employees will also be required to pay a portion of their respective wages for the tax. Churches (and other nonprofit organizations) must deduct the employees' portion of the tax from their employees' wages and deposit both employer and employee shares in designated depositary banks along with income taxes withheld from employees' wages. Additionally, they must now report F.I.C.A. taxes along with the withholding taxes on Form 941. Thus, Section 102 of the Social Security Amendments of 1983 in effect imposes two new taxes that affect the church:

1. Among the changes implemented by Public Law 98-21 are provisions that extend social security coverage to all federal employees hired after 1983, all current members of Congress, the federal judiciary and the President and Vice President (Section 101); prohibit state and local governments that participate in coverage from terminating their coverage, as was allowed under prior law (Section 103); and, increase payroll taxes for employers and employees (Section 123).
2. Ordained ministers are treated as "self-employed" even though they may receive regular salaries or wages from their churches. They are not subject to the withholding requirement. Rather, they are required to report their earnings and pay quarterly estimated taxes separate from any withholding requirement applicable to their churches. Thus, a small church with no employees other than a pastor would not be required to withhold taxes or file the quarterly report, Form 941, that would be required as to other church employees.
3. The formal designation is Federal Insurance Contributions Act (F.I.C.A.) Tax.

one on the church employee and a separate tax on the church itself. The latter tax is unprecedented in American history.

THE LAW PRIOR TO THE 1983 AMENDMENT

Under the prior law, service performed in the employ of a church was automatically excluded from social security taxation.[4] This exempt status could be waived by any church that chose to participate voluntarily in the social security program. Waiver was accomplished merely by filing a form with the Internal Revenue Service.[5]

Many churches opted to waive their exemptions and participate in the system. The Social Security Amendments of 1983 have two consequences for these churches. First, their participation in the program, which was formerly voluntary, is now mandatory. Second, their participation, which was formerly terminable, is now irrevocable.

RESPONSES OF CHURCHES THAT CHOSE TO RETAIN THEIR EXEMPT STATUS UNDER PRIOR LAW

Churches that remained out-of the social security system

4. 42 U.S.C. Sec. 410(a)(8).
5. 26 U.S.C. Sec. 312(k)(1)(A). After the exempt status was waived, it could be regained. Regaining the exemption, however, was more burdensome than waiving it; the church was required to have participated in the social security system for at least eight years and then to give two years' advance written notice of its decision to withdraw from the system. 26 U.S.C. Sec. 312(k)(1)(D).

under the prior law face more serious consequences. From a practical standpoint, there is the prospect of additional strain on church budgets at a time when church parishioners, facing similar tax increases, are less able to provide support. More serious than the practical difficulties are legal and theological objections. Many churches will face litigation and other undesirable consequences because they will refuse to pay the tax, based on beliefs that to do so would be contrary both to the Bible and to the United States Constitution.

Undoubtedly the overwhelming majority of these refusals to pay will be reluctant and respectful. These churches are constituted by law abiding persons. They will not be manifesting a spirit of lawlessness or wanton disobedience. Rather, they will perceive that Higher Authority than government mandates that they refuse to pay the tax. They will be faced with the dilemma of choosing between obedience to God and obedience to government. While they respect and support government, they will perceive no choice but to disobey it where they must do so in order to obey God.

THE LEGISLATIVE HISTORY

The Social Security Amendments of 1983 were Congress' response to the fiscal crisis facing the social security system.

Prior to enactment there were vigorous discussions and wide divergence of views as to how to approach the problem. There was much controversy.

One consequence of the enactment was increased social security taxes for those already under the system. Many unprecedented steps were also taken. For instance, participation by federal employees, members of Congress, the federal judiciary, and the President and Vice President was required.

However, the legislative history reflects that in all of this virtually no attention was given to an extremely complex and controversial two part question: whether it is constitutional to impose the tax on churches; and, assuming for the sake of discussion it is constitutional, whether it would be good policy to do so.

THE FIRST AMENDMENT RELIGION CLAUSES

The First Amendment free exercise clause forbids the federal and state governments from prohibiting the free exercise of religion. The establishment clause prohibits enactment of any law "respecting an establishment of religion."

The establishment clause has been interpreted to mean that government should not act to advance or inhibit religion or particular religions and that government and religion should

30-336 O—84——12

not be excessively entangled with one another. Excessive entanglement occurs when the government is a monitoring, surveilling force, threatening the intimidation or suffocation of religious organizations. Such entanglement interferes with free exercise of religion, thus violating both the free exercise and establishment clauses.

The ultimate objective of the establishment clause is to preclude the establishment of an official religion, with authority or governmental preference over other religions. Obviously, if a religion becomes so established it will necessarily lessen the free exercise of the other nonestablished religions and will threaten their very existence. Therefore, in a real sense the ultimate purpose of the establishment clause, like the free exercise clause, is to protect the free exercise of religion.

A challenge to the constitutionality of the Social Security Amendments of 1983, as they affect churches, will involve both free exercise and establishment clause considerations. A detailed and extensive presentation of the arguments against the constitutionality of Section 102 (which imposes the tax on churches) is beyond the scope of this discussion. However, an outline of the arguments will show that they are not frivolous but are worthy of very serious consideration.

THE FREE EXERCISE CLAUSE

The constitutional test for whether an enactment

violates the free exercise clause was set forth by the United States Supreme Court in Sherbert v. Verner.[6] There the Court held that a claimant (a church, for example) must prove that the government has burdened a sincere religious belief or exercise. Once this is established, the government must then demonstrate it has a compelling interest sufficient enough to override the religious belief or exercise in question. However, even if the government demonstrates such an interest, it must also show it has satisfied its interest in the least restrictive means possible. Then, and only then, should the government be allowed to prevail.

A related inquiry is whether the government's objective is materially frustrated by accommodating the free religious exercise of the claimant.[7] If the religious exercise can be accommodated without materially detracting from the government's accomplishment of its objective, then failure to accommodate by the government violates the free exercise clause of the First Amendment.

The burdensome effect of the social security tax should not be difficult to establish. Most churches can demonstrate the burden on their operations not only because of the financial impact, but also because of theological and religious beliefs.

Simply put, what individuals give to the church, they give to God. Scripture teaches, in the view of many, that the state has no authority to, in effect, tax God. The churches view

6. 374 U.S. 398 (1963).
7. Wisconsin v. Yoder, 406 U.S. 205, 234 (1972).

their funds as held in sacred trust for use in God's work only. To allow a portion thereof to be diverted to Caesar will be a violation of a central precept of the faiths of many believers. Faced with the tax, churches will have to choose whether to obey their government and thereby commit sin on the one hand, or to obey God and thereby disobey the law of the state on the other hand.

Moreover, throughout our history, the respective jurisdictions of church and state have been treated as co-equals under God. Since the taxing authority in essence controls what it taxes, taxation of the church by the state would overthrow the constitutional balance between them. To disrupt the balance not only threatens the church, it also threatens to destroy the vitality of the state. The balance that has existed is rooted in religious origins. To disrupt it will inevitably result in heavy burdens on the free exercise of religion for all.

Once a church establishes the burdensome effect of the tax, the burden will shift to the government to establish its compelling interest, that the tax serves that interest in the least burdensome way and that no other means exist to accommodate the churches' interests without materially detracting from the government objective. In United States v. Lee,[8] the operation of this test was illustrated. There an Amish employer sued for a refund of social security taxes which had been collected from him and his Amish employees. His religious belief was that payment

8. 445 U.S. 252 (1982).

of the tax or receipt of the benefits of social security was forbidden by the Amish faith. The sincerity of those beliefs was conceded.

The United States Supreme Court had little trouble finding that the government had a compelling state interest in maintaining the social security system. The Court accepted the premise that mandatory participation is indispensable and that to allow widespread voluntary participation would undermine the program.[9] The Court also held that Congress "has accommodated, to the extent compatible with a comprehensive national program, the practices of those who believe it a violation of their faith to participate in the social security system."[10]

Therefore, the Supreme Court found that the government had prevailed on the "compelling interest" and "least intrusive means" tests. Lee was forced to participate and pay social security taxes over his religious-based objection.

However, taxation of churches is distinguishable from United States v. Lee. Like Lee, some churches will establish that paying the tax collides with their religious beliefs. The question then will be: Can the government establish (1) that it has a compelling interest in taxing churches, and (2) that it cannot accommodate the churches without materially hindering governmental objectives?

One argument on behalf of churches should concern

9. Id. at 1055-1056.
10. Id. at 1056-1057.

statistical data. Not all churches have theological objections to the tax. Many have chosen to participate when the program was voluntary. If a relatively small number of churches could opt out of the social security system, then the government would be hard pressed to maintain that the soundness and financial integrity of the system require their mandatory participation. If only a few churches remain out, how is the government's objective materially frustrated?

There is another important way in which churches in general can be distinguished from the Amish employers and employees considered in United States v. Lee. The Court noted that Congress had granted an exemption to self-employed Amish and others, but not to Amish who were in an employer-employee relationship. The former category was deemed to be a "narrow category which was readily identifiable."[11] Therefore, Congress had acted appropriately in accommodating the former category.

Churches, like the category of self-employed Amish, constitute a "narrow category which [is] readily identifiable." Indeed, prior to the 1983 amendments, churches had been identified by Congress and singled out, along with other nonprofit organizations, for exemption. Therefore, it would be appropriate for Congress to continue the accommodating policy of the past--namely exempting churches from mandatory participation in the social security system.

11. Id. at 1057

Finally, United States v. Lee may be further distinguished. The Court in Lee noted that when religious persons enter into commercial activity as a matter of choice, "the limits they accept on their own conduct as a matter of conscience and faith are not to be superimposed on the statutory schemes which are binding on others in that activity."[12] Thus, it was not the religious undertaking itself that was burdened in Lee. Rather, it was the religious beliefs of a person engaged in commercial activity. They sought to be singled out from others in the commercial realm.

Churches do not operate in the commercial realm. Rather, their activities are substantially religious in content and intent. They have not or should not have entered into commercial activity. On the contrary, the government is entering into the religious realm in seeking to tax churches.

Thus, the government's intrusion is far more burdensome and less justifiable than in United States v. Lee. The government's interest is far less compelling than in Lee. Moreover, it can be argued that the government has failed to utilize a way to accomplish its objective that would accommodate the beliefs of churches without materially frustrating governmental objectives.

TAXATION OF RELIGIOUS ACTIVITY. Another line of cases concerns taxation of religious activity. In Murdock v. Pennsylvania,[13] the United States Supreme Court considered a city

12. Id. at 1057.
13. 319 U.S. 105 (1943).

ordinance that required door-to-door peddlers to pay a "license tax" prior to peddling their wares. The petitioners who challenged the ordinance were Jehovah's Witnesses who traveled door to door distributing their religious literature. They sold their wares for specified "contributions," lesser sums, or donations. Upon refusal to obtain the licenses, the Jehovah's Witnesses were convicted for violating the ordinance.

The Supreme Court reversed their convictions. The Court emphasized that the tax involved was a license tax "levied and collected as a condition to the pursuit of" activities protected by the First Amendment.[14]

Murdock is important precedent in any challenges to the social security tax for several reasons.

First, in Murdock the Court referred to the license tax as a prior restraint on the free exercise of religion. Strictly speaking, however, the social security tax will not be levied as a prior condition to the operation of church-ministries (that is, the tax does not have to be paid in advance). Nevertheless, it will be a condition upon the continued operation of church activity that involves paid employees.

Second, in Murdock the license tax did not apply only to religious colporteurs. Rather, it applied to all soliciting activities, commercial or otherwise. As with the 1983 Social Security Amendments, the religious groups were not singled out for taxation. Nevertheless, the Court held:

14. Id. at 114.

> The fact that the ordinance is "nondiscriminatory" is immaterial. . . . A license tax certainly does not acquire constitutional validity because it classifies the privileges protected by the First Amendment along with the wares and merchandise of hucksters and peddlers and treats them all alike. Such equality in treatment does not save the ordinance. Freedom of press, freedom of speech, freedom of religion are in a preferred position.[15]

Thus, it may be stated that application of the social security tax to churches is unconstitutional, even though the tax is "nondiscriminatory."

The Supreme Court made other sound observations in Murdock. For example, the Court stated:

> The power to tax the exercise of a privilege is the power to control or suppress its enjoyment. . . . Those who can tax the exercise of this religious practice can make its exercise so costly as to deprive it of the resources necessary for its maintenance. (Emphasis added.)[16]

The same can be said for the social security tax imposed upon churches. To label the tax an "excise" on the employer-employee relationship, rather than a tax upon religious activity, and to thereby approve it, would be to ignore substance in favor of form. However it is designated, the tax will result in a reduction of the funds of the church, and the effect will be the same.[17]

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15. Id. at 115.
16. Id. at 112.
17. See also, Follett v. McCormick, 321 U.S. 573 (1943) (unconstitutional to impose license tax on a Jehovah's Witness who earned his living as an "evangelist" or "preacher," that is, by distributing religious literature door to door) and McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819) (the power to tax necessarily includes the power to destroy).

ESTABLISHMENT CLAUSE CASES

For a statute to pass muster under the establishment clause, (1) it must have a secular legislative purpose; (2) its principal or primary effect must be one that neither advances nor inhibits religion; and, (3) it must not foster an excessive government entanglement with religion.[18]

The Social Security Amendments of 1983 would probably qualify as having a secular legislative purpose, namely, improving the solvency of the social security program. However, churches may reasonably argue that imposition of the tax inhibits religion. Of course, a question sure to be raised is whether the principal or primary effect is to improve the financial status of the social security system or to inhibit the financial status of the churches. It may be that the former was the intended effect. Nevertheless, the latter is the means by which the former is accomplished.

EXCESSIVE ENTANGLEMENT. For our purposes, a leading entanglement case is Walz v. Tax Commission.[19] There the United States Supreme Court upheld a New York City property tax exemption of church real estate (as well as that owned by other nonprofit organizations) against the challenge that it violated the Establishment Clause. In Walz the Court compared the effects of exemption versus taxation in the following terms:

18. Lemon v. Kurtzman, 403 U.S. 602, 612 (1971).
19. 397 U.S. 664 (1970).

> Either course, taxation of churches or exemption, occasions some degree of involvement with religion. Elimination of exemption would tend to expand the involvement of government by giving rise to tax valuation of church property, tax liens, tax foreclosures and the direct confrontations and conflicts that follow in the train of those legal processes. (Emphasis added.)[20]

As with the property taxation involved in Walz, elimination of the social security exemption will tend to expand the involvement of government in churches. So long as participation was on a voluntary basis, the likelihood of confrontation was minimal. Mandatory participation, however, will result in expanded administrative contacts, audits, conflicts and confrontations. Exemption, as the Court noted in Walz, generates "minimal and remote involvement between church and state and far less than taxation of churches."[21]

Walz v. Tax Commission holds that tax exemption for churches does not violate the United States Constitution. Although the Supreme Court did not hold that tax exemptions are constitutionally required, it did, in reviewing the historical background of taxation and exemption, imply that exemption might well be mandated. As the Court stated:

> All of the 50 States provide for tax exemption of places of worship, most of them doing so by constitutional guarantees. For so long as federal income taxes have had any potential impact on churches--over 75 years--religious organizations have been expressly exempt from the tax. . . . Few concepts are more deeply embedded in the fabric of our national life, beginning with pre-Revolutionary colonial times, than

20. Id. at 674.
21. Id. at 676.

> for government to exercise at the very least this kind of benevolent neutrality toward churches and religious exercise generally so long as none was favored over others and none suffered interference.[22]

The historical survey made in Walz, especially in light of recent cases,[23] also supports an argument that tax exemption is required by the First Amendment. This view is consistent with the historical protection of religious liberty. As previously mentioned under the discussion of "free exercise," utilization of the taxing power with respect to churches can quickly lead to abuses. If the power to tax is the power to destroy or at least to control, then it is a power which government should not assert over churches.

In Lemon v. Kurtzman,[24] the Supreme Court observed that "[t]he objective [of the establishment clause] is to prevent, as far as possible, the intrusion of either [church or state] into the precincts of the other."[25] Similarly, in School District of Abington Township Pa. v. Schempp[26] Justice William Brennan, in his concurring opinion, said:

> What Virginia had long practiced, and what Madison, Jefferson and others fought to end, was the extension of civil government's support to religion in a manner which made the two in some degree interdependent, and thus threatened the freedom of each. (Emphasis added.)[27]

In the present context, government taxation of the church will involve the intrusion of each into the precincts of

22. Id. at 676-677.
23. See, for example, Marsh v. Chambers, 103 S.Ct. 3330 (1983).
24. 403 U.S. 602 (1971).
25. Id. at 614.
26. 374 U.S. 203 (1963).
27. Id. at 234.

the other. Government, for the first time in history, will receive a portion of its revenue directly from church budgets. Government will become a partner of sorts, or a financial beneficiary of churches.

This will mean that churches will have an interest in government activities beyond their traditional roles as moral watchdogs, since their budgets will be directly affected by government expenditures. Churches that might have remained silent over a political issue will find themselves, in the face of economic stresses, speaking out on the side that favors reduction in taxes. Certainly, if the church is taxed it should have this right.

As a corollary to this, taxation of churches will result in tension between two of our nation's important traditions. In Larkin v. Grendel's Den[28] the United States Supreme Court observed that our system of government excludes churches from government affairs. Thus, while they are free to speak out on "moral issues," churches have traditionally avoided the more mundane facets of politics. This tradition is dearly held and of long duration.

A second dearly held and long enduring tradition is embodied in the principle that there should be no taxation without representation. Due to the 1983 Social Security Amendments, if churches are on the tax rolls, they, as taxpayers, will be entitled or even forced to become directly involved in

28. 51 U.S.L.W. 4026 (1983).

lobbying and other political processes. Such activity could not fairly be prohibited by government, since to do so would be to subject the church to taxation without representation.

The amendments then could lead to churches becoming directly involved in partisan politics and to political divisions along sectarian lines. That Section 102 of the Social Security Amendments of 1983 could lead to such results is a strong argument that it is unconstitutional.

RECENT HISTORICAL PERSPECTIVE. In Marsh v. Chambers,[29] the United States Supreme Court upheld the practice of opening each session of the Nebraska legislature with prayer by a chaplain paid out of public funds. The practice had been challenged as being in violation of the establishment clause. The Court did not utilize the usual establishment clause tests in deciding the issue. Rather, their decision centered on a study of history. That practices similar to the Nebraska practice were acceptable to the framers of the First Amendment was deemed highly persuasive in holding that the practices did not violate the establishment clause.

The Marsh use of historical study lends further support to the position that taxation of churches is unconstitutional. The historical discussion in Walz indicated that exemption from taxation has, from our country's inception, been routinely granted to churches. In fact, those who drafted the United States

29. 103 S.Ct. 3330 (1983).

Constitution soon after its signing specifically exempted churches in Washington, D.C., and surrounding areas from taxation. To the founding fathers it was not a violation of separation of church and state for churches by law to be free from the taxing power of the state. The concept that churches should be taxed was unthinkable in early America. It was simply taken for granted that exemption was required. To impose taxation upon churches will be a striking departure from historical practice.

CONCLUSION

There will be many churches that will emphatically object to payment of social security taxes or mandatory participation in the social security system. The objections are not frivolous but are based on long enduring, deeply held beliefs about the proper relationship between church and state. Should the tax be imposed on them, the prospect of fairly widespread and divisive legal conflicts, with extremely unpleasant and even dangerous implications, is not remote.

Moreover, there are substantial First Amendment arguments against the constitutionality of imposing the tax on churches on a mandatory basis. Preservation of these constitutional principles would benefit all of our society, not just churches.

The legislative history does not reflect that these

constitutional arguments or churches' objections were brought to the attention of Congress. Nor does the legislative history reflect a study to determine how many churches would have theological objections, how many would refuse to pay the tax, or whether the number would be small enough that the objecting churches could be accommodated without detracting from the overall purposes of the amendments. Indeed, if Congress was not made aware of any objections, it would not have had any reason to consider whether, and how, an accommodation should be effected.

In view of the seriousness of the issues, their complexity and their explosive and divisive nature, Congress should reconsider Section 102 of the Social Security Amendments of 1983. At the very least, Congress should delay the effective date of Section 102 until extensive hearings can be held, with testimony from religious and legal experts. Only then can there be the prospect of resolution of this problem legislatively, rather than through bitterly contested court battles.

Respectfully submitted,

T N Williams

T. N. Williams

TO: Roderick A. DeArmant
Chief Counsel - Committee on Finance
Room 219, Dirksen Senate Office Building
Washington, DC 20510

FROM: Rev. Michael D. Allison, B.A., M.R.E., D. Min.
Chairman/Tennessee Council for Religious Freedom
Pastor/Temple Baptist Church
P O Box 291
Manchester, Tennessee 37355

FOR: December 14, 1983 hearing on Mandatory Social Security for Religious Non-profit Organizations.

Because of the Social Security Compromise Bill, passed in March, 1983, and signed by the President in April, 1983, beginning January 1, 1983, churches will be required to pay Social Security equal to seven percent of an Employee's wages as well as withhold 6.7 percent of an employee's earnings. IRS enforcement options in cases of non-compliance could include seizure of bank assets and property and the beginning of criminal proceedings against the person or persons who made the determination not to pay the tax, which could include $10,000 fines and 5 year imprisonment.

Not only is this part of the law a clear violation of both the "establishment" and "free exercise" clauses of the first amendment of the U.S. Constitution, but its enforcement will cause thousands of churches across the country to jeopardize their very existence by refusing to submit to the provisions of this law that place the government over the church, its ministries, and its finances. The American Coalition of Unregistered Churches has estimated that between 5-10,000 churches will refuse to pay the tax because of their religious conviction that Christ, not

Caesar, is the head of the church.

If a postponement is not granted for the churches, 1984 will find the courts jammed with lawsuits across the country. It could also be the year that thousands of preachers in America, are sent to prison, and thousands of churches closed by the state. It should be noted that the group I am speaking of is the group that has always stood for patriotism and obedience to the law.

It must be understood that the complaint is not with Social Security. Neither is our complaint with taxes. Although we are unhappy with the unwise use and mismanagement of tax dollars by our government that has brought us to the place where we are willing to throw religious freedom in America out the window for a few more dollars to save a bankrupt program, we do believe that Scripture teaches us, as individuals, to pay taxes, whether we agree or not with their use. No, we are not tax protesters. I personally pay my taxes, including Social Security, which will jump to 14% of my income in 1984. Our complaint is that the government is placing itself over the Church of Jesus Christ by forcing it to pay taxes, and forcing it to use its personnel and monies to keep records of these taxes. It is also making the Church a government agent, in that the Church will be required to withhold taxes for the government from each employee.

The history of our nation is against taxation of the church. Since pre-revolutionary war days, churches have been exempt from taxes. They were not required to participate in underwriting the cost of the state. Even after the 16th Amendment in 1916,

nonprofit organizations, such as churches, were never considered the objects of possible taxes. The reason for this is twofold. First, with relatively small exception, funds received by churches are gifts, not income. The money placed in the Sunday morning offering plate is not like that taken in by businesses. The offering is not a compensation for services rendered, it is a gift to God. To demand the church to take money that was given to God is the same as "taxing God."

Secondly, only a greater taxes a lesser. For the government, to demand the church to pay taxes, whether it be on property or employees, is to say that that government is over the church. Historically, it has been recognized in this country that only God is over the church.

I personally agree with many Congressman that Tax Tuition Credits and other type plans would violate the Constitution. It would create a relationship between church and state similar to that rejected by the Supreme Court in Lemon v. Kurtzman. Justice Burger saw a "grave potential for excessive entanglement." Further the "comprehensive, discriminating and continuing state surveillance" required to insure that state-funded teachers were not impermissibly utilized would create an enduring entanglement," as did the state's necessary inspection of school records. Anyone can see that the relationship being set up in taxing the churches of America is far more entangling than the relationship described in Lemon v. Kurtzman.

The authors of <u>The Battle for Religious Liberty</u> stated,

"In a number of cases (frequently involving financial assistance to religious schools) the courts, while finding no impermissible purpose of effect, have struck down statutes because of the entangling of the institutions. The Court has spoken of the government's impermissible 'comprehensive, discriminating and continuing' surveillance of the programs, the use of funds, accounting decisions, etc. For example, some statutes have attempted to provide financial assistance to religious schools but limited this assistance to the teaching of "secular" subjects only. The government would then have to review the curriculum and accounting procedures. Courts have found such arrangements to inevitably involve government entanglement with the religious institutions. Therefore they violate the Establishment Clause."[1]

How can "giving money to" an organization be excessive entanglement and "taking away from" is not? No doubt, this entanglement, which is clearly a violation of the First Amendment, and a complete departure of our nation's history with regards to churches, will cause many to pay the tax under protest, and to seek the courts to relieve the situation if a postponement is not granted by the legislature.

More seriously, there are thousands of pastors and churches who will simply not comply with paying the Social Security tax from the church treasury because to do so would be a violation of their faith.

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[1]Buzzard, Glen and Samuel Ericsson, The Battle for Religious Liberty. David C. Cook Publishers, Elgin, Illinois, 1982. Page 58.

These men believe the Church belongs only to God, Jesus Christ is the Head of the Church (Colossians 1:18), and therefore, the government has no authority over the church, its ministries, or its treasury. They believe that when Jesus said we are to "render unto Caesar the things that are Caesar's, and render unto God the things that are God's," individual Christians were required to pay taxes. However, the Scripture also states that "tithes and offerings are the Lords." Therefore, Caesar (the government) has no right to claim them, nor do the Christians have the right to take that which is the Lord's and give it to Caesar.

It matters not whether the Congress agrees with this belief or not. It is a view that has been held for centuries by Bible-believing Christians, honored by our government for its first 207 years, and protected by our Constitution. It should be understood that even if our government refuses to honor these religious convictions any longer, or that the Supreme Court refuses to protect such beliefs in its rulings, they cannot alter the religious convictions of thousands. There are men willing to go to jail for this conviction. There are churches willing to face the prospect of losing their property and being forced to meet in the woods as in communist lands.

One Senator justified the forced payment of the Social Security Tax on churches by saying that the Social Security system needed the money to survive. What good is the life of a government system when the most precious freedom our country has will have been destroyed.

We realize too, that this not the end. If the government is allowed to enforce this tax on the church, why not other taxes? Afterall, other government agencies need money too.

John Marshal, a former Supreme Court justice stated the case well when he said: "The power to tax is the power to control, and the power to control is the power to destroy." Taxable organizations are answerable to the government, open to inspection and dictates of the government. The material assets of a church are a sacred stewardship held in trust for Jesus Christ, the Head of the Church. The very concept of taxation assumes sovereignty, control, and lordship over God and His purchased possession.

Some would ask, "Why all the alarm?" To quote James Madison:

> It is proper to take alarm at the first experiment with our liberties...the freemen of America did not wait till usurped power had strengthened by exercise, and entangled the question in precedent. They saw all the consequences in the principle, and they avoided the consequences by denying the principle...The same authority which can force a citizen to contribute 3 pence only of his property the for support of one establishment, may force him to conform to any other establishment in all cases whatsoever."[2]

If Congress does not intervene to right this wrong immediately, 1984 could spell the death knell for Religious Freedom in America. Humbly, I request that you postpone the payment of Mandatory Social Security Taxes by religious nonprofit organizations.

Thank you.

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[2]Memorial and Remonstrance Against Religious Assessments, Appended to Everson v. Board of Ewing Township, 330 US 1, 65 (1947).

"SUMMARY STATEMENT"

As stated by the Christian Law Association: "This issue of the involuntary application and enforcement of Social Security with regard to Bible-believing and Bible-teaching churches, if decided contrary to sincerely-held Biblical convictions, has the greatest potential of any other current legal issue in America of forcing pastors to be jailed and church property seized and sold."

The American Coalition of Unregistered Churches has stated that at least 5,000 churches will refuse to pay the tax because of religious conviction. Therefore, if the tax is not postponed with regards to churches, 1984 will be a year of unprecedented government action against American churches and pastors. These pastors see the taxing of the church as a violation of their faith, as tithes and offerings are the Lords, not the governments. They see it also as a claim of sovereignty over the church by the government when only Christ is the Head of the Church.

Many other pastors will pay the tax under protest, followed by legal action, because they see it as a flagrant violation of both the "Free Exercise" and "Entanglement" clauses of the First Amendment to the Constitution. We realize the Social Security program is in trouble. However, if the cost of saving that program is our First Amendment freedom of religion, the price is higher than we are willing to pay.

Our plea is to charge the employees as individuals if necessary, but keep your hands off the Church of Jesus Christ.

TESTIMONY BEFORE THE

COMMITTEE ON FINANCE

UNITED STATES SENATE

BY

Herbert W. Titus

My name is Herbert W. Titus. I am Dean and Professor of Law in the School of Public Policy and Vice President for Academic Affairs at CBN University, Virginia Beach, Virginia. I hold the Juris Doctor degree from Harvard and have taught constitutional law since 1965 at the state universities of Oregon, Colorado, and Oklahoma, and at Oral Roberts University. CBN University is closely affiliated with The Christian Broadcasting Network, Inc. Since 1976, both the University and the Network, as non-profit religious organizations, have exercised their statutory right to be free from the social security tax and have chosen a privately administered tax-sheltered annuity retirement program.

I appear today as a constitutional law expert and as a representative and employee of the University and of the Network to oppose the forcible inclusion of the non-profit religious organizations and their employees under Social Security and to favor Senate Bill 2099 that would postpone that inclusion for two years.

UNTIL 1983, CONGRESS CONSISTENTLY RESPECTED THE CONSTITUTIONAL WALL OF SEPARATION OF CHURCH AND STATE BY ALLOWING RELIGIOUS ORGANIZATIONS TO CHOOSE NOT TO BE INCLUDED IN THE SOCIAL SECURITY PROGRAM.

Until it enacted the Social Security Amendments of 1983, Congress respected the constitutional right of religious organizations to be exempt from the social

security tax. The original social security bill, as proposed by President Franklin D. Roosevelt's Advisory Council and Economic Committee and as introduced in Congress, did not exempt non-profit organizations. The Ways and Means Committee of the United States House of Representatives, however, unanimously approved an amendment to exempt such organizations from the new tax. The Senate concurred and on August 14, 1935, the first Social Security Act became law.*

Notwithstanding this clear policy choice of Congress, this same Presidential Advisory Council sought in 1939 to amend the law to force the non-profit organizations under social security. Once again, the Senate and the House refused. On this occasion, as on the previous one, members of Congress objected, in part, on constitutional principle: That the social security tax, if levied on religious and other similar organizations, would violate the First Amendment religious freedom guarantees.**

Ten years later, Congress again rejected proposals to force religious organizations under social security in response to testimony that such a move would be contrary to principles "deeply rooted in our national heritage."*** This time, however, Congress voted for an amendment to allow non-profit organizations, including religious ones, to participate in the Social Security program on a voluntary basis.

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*See Edwin E. Witte, The Development of the Social Security Act, 131 (1963)

**Hearings on H.R. 6635 Relative to the Social Security Act Amendments of 1939 Before the House Committee on Ways and Means, 76th Congress, 1st Sess., Statement of Marion B. Folsom, 1144-46 (1939). See also H.R. Rep. No. 728, 76th Cong., 1st Sess. 17 & 120 (1939).

***Hearings on H.R. 6000 Before the Senate Committee of Finance 81st Cong., 2d Sess., Statement of Eugene J. Butler, National Catholic Welfare Conference, 2355 (1950).

In 1976, when the forcible inclusion issue was raised again, the voluntary inclusion option remained substantially unchanged. The religious freedom question was not even raised, apparently because all assumed that it had been finally laid to rest.

Thus, when this Congress voted to impose the social security tax upon non-profit religious corporations, it departed from its unbroken record of commitment to the protection of religious freedom in the social security law.

THE 1983 FORCIBLE INCLUSION OF RELIGIOUS ORGANIZATIONS AND THEIR EMPLOYEES UNDER SOCIAL SECURITY VIOLATES THE FREE EXERCISE CLAUSE OF THE FIRST AMENDMENT.

THE SOCIAL SECURITY TAX IS NOW A DIRECT TAX ON A RELIGIOUS ACTIVITY.

In his press release announcing this hearing, Senator Robert Dole has stated that "the social security tax would be levied on the earnings of covered employees, not on the church or religious organization."

The social security tax is not a tax on earnings, but is rather an excise tax levied on the privilege of employment and paid by an equal assessment on both the employer and the employee. This amount of this excise tax is measured by a specified percentage of the employee's salary up to a maximum of $35,700.

The employer's contribution, by definition, cannot be paid out of the earnings of the employees. Even the United States Supreme Court has recognized this fact and has, therefore, characterized the tax on the employer as an "excise or duty upon the relation of employment." Helvering v. Davis, 301 U.S. 619, 645, 57 S. Ct. 904, 911 (1937).

Even the tax paid out of the employee's earnings is in reality levied on the privilege of employment. Any tax on a privilege must be measured in some manner. At present, Congress has chosen to determine the amount of the social

security tax as 7 per cent of the employee's salary up to a $35,700 ceiling. If this were a true tax on earnings, it would not stop at any such artificially fixed ceiling. Rather, each dollar earned would be subject to the tax.

Because the social security tax is levied on the "employment relation," it is a direct tax on one of the most essential functions of the non-profit religious organization, namely, the employment of people necessary to promote its religious goals and objectives. There is no escape from that fundamental fact.

Similar taxes, even though generally levied, were found unconstitutional by the United States Supreme Court in the 1940's. Murdock v. Pennsylvania, 319 U.S. 105, 63 S. Ct. 870 (1943) and Follett v. Town of McCormick, 321 U.S. 573, 64 S. Ct. 717 (1944). In Murdock, a general license tax for the privilege of soliciting the sales of goods was found unconstitutional when applied to a Jehovah's Witness who was engaged in the door-to-door selling of religious tracts. In Follett, a license tax on those engaged in the business of selling books was found unconstitutional when applied to a Jehovah's Witness who made his living selling religious tracts from house to house.

In Murdock, the Court clearly pointed out the constitutional distinction between a tax levied on income or property derived from employment in a religious activity from a tax levied on the activity itself:

> "It is one thing to impose a tax on the income or property of a preacher. It is quite another thing to exact a tax from him for the privilege of delivering a sermon. The power to tax the exercise of a privilege is the power to control or suppress its enjoyment." (391 U.S. at 112, 63 S. Ct. at 874)

In a day when preachers utilize modern media such as television and radio, it is absolutely necessary for them to employ cameramen, production managers,

and other technical experts in order reach their audience in homes across America. To allow Congress to tax that employment privilege would be no less an exercise of "power to control or suppress" the privilege of delivering a sermon as was the case in Murdock.

Moreover, for Congress to tax the employment privilege would reserve "freedom of religion...for those with a long purse." Follett v. McCormick, 321 U.S. 573, 576, 64 S. Ct. 717, 719 (1944). Many churches and religious organizations operate on very little; others are blessed with substantial finances. The very essence of the constitutional guarantee of the "free exercise of religion" is to protect religious activities from tax levies that would discriminate against the religious views of those who are too poor to pay and in favor of the views of those who are able to pay their taxes.

THE SOCIAL SECURITY TAX IS NOW ALSO A DIRECT TAX ON THE TITHES AND OFFERINGS TO GOD.

The revenue out of which a religious employee is paid and, hence, out of which the employee's social security tax is paid are the tithes and offerings freely given to the religious employer. Likewise, the tax on the employer comes out of the same voluntarily contributed funds.

In America's early history, several states used their taxing power to collect the tithe on behalf of the church. Beginning in the late 18th century and concluding in the early 19th century, state after state steadily discontinued that practice. Virginia set the example for these states by repealing its laws to collect the tithe and by enacting a free exercise of religion clause in its 1776 Constitution. Virginia's free exercise clause became the model for an identical guarantee in the First Amendment of the

United States Constitution. M. Malbin, RELIGION AND POLITICS 19-27(1978) In order to make absolutely sure that the new United States Government would avoid the mistakes of the past, the first Congress added the prohibition against any law respecting an establishment of religion.

These twin religious freedom guarantees have been designed to erect a wall of jurisdiction separating church and state. If the state has no authority to collect the tithe of the church, then it has no authority to tax that tithe. Otherwise the jurisdictional wall would be breached.

Forcible inclusion of religious workers in a social security program would violate both the free exercise clause and the establishment clause of the First Amendment. First of all, the exercise of religion would no longer be free but subject to the power of the government to tax. Chief Justice John Marshall has reminded us that the "power to tax is the power to destroy." Thus, allowing the government the power to tax here would be the first step to the exercise of total control.

Second, the program would be an unconstitutional establishment of religion because it would divert tax money to support religious workers upon retirement. It would clearly be unconstitutional for the government to levy a tax to pay the salary of religious employees while working. What constitutionally sufficient distinction exists between that tax and the social security tax that pays the salary of religious workers after they retire? Both taxes, in effect, force the people to pay the tithe to support the work of the church whether it be for evangelism while the employee is working or charity for the church's retired employees.

THE NEW SOCIAL SECURITY TAX ON RELIGION DOES NOT PROTECT RELIGIOUS

EMPLOYEES. TO THE CONTRARY, IT DESTROYS EXISTING BENEFITS UNDER VOLUNTARY RETIREMENT PROGRAMS.

In his press release announcing this hearing, Senator Dole announced that the "purpose" of the mandatory tax on religious employers and employees was "to ensure social security protection" for such employees. In fact, this statutory change destroys the benefits now enjoyed by employees under existing voluntary retirement programs that have been financed by employee-employer joint cooperation in anticipation that their constitutional rights would be respected by this Congress.

For example, since 1976, The Christian Broadcasting Network and its affiliate University have provided for retirement for their employees under a tax-sheltered annuity program. During the years in which this program has been in effect, the employer and employees, exempt from the 7 per cent social security tax, have made contributions to that fund based upon a percentage of the employee's earnings.

Beginning with the first pay period in 1984, CBN's employees will be forced to utilize the money previously designated for the tax-sheltered fund to pay the social security tax and, in addition, will be forced to find additional funds to pay the income tax on that money which has been, until now, protected from such a tax.

Thus, employees of CBN will not gain any protection from the Social Security Amendments of 1983. Instead, they will lose the full benefit of the retirement protection that they now have.

CONGRESS SHOULD EITHER RESTORE THE EXEMPTION FROM SOCIAL SECURITY HISTORICALLY ENJOYED BY RELIGIOUS ORGANIZATIONS AND THEIR EMPLOYEES OR, AT THE

VERY LEAST, GRANT THE TWO-YEAR EXTENSION OF THAT EXEMPTION AS PROVIDED BY S. 2099.

Congress has always respected the limitations on its taxing power that are contained in the religious freedom guarantees of the First Amendment until it enacted the Social Security Tax Amendments of 1983. This substantial departure from its past respect for constitutional liberty occurred without any significant hearings or debate. Members of Congress should act quickly in response to their oaths to uphold the Constitution to restore the historically recognized and constitutionally required tax exemption for churches and non-profit organizations. At the very least, their oaths require them to enact the two-year delay embodied in Senate Bill 2099.

December 14, 1983