In the

# Supreme Court of the United States

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| BOB JONES UNIVERSITY, | ) | |
| | ) | |
| Petitioner, | ) | |
| | ) | No. 72-1470 |
| vs | ) | |
| | ) | |
| GEORGE P. SHULTZ, SECRETARY OF THE TREASURY, et al | ) | |

Washington, D. C.
January 7, 1974

Pages 1 thru 35



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| v. | : | No. 72-1470 |
| GEORGE P. SHULTZ, SECRETARY OF THE TREASURY, et al | : | |

Washington, D.C.

Monday, January 7, 1974

The above-entitled matter came on for argument at 1:08 o'clock p.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM O. DOUGLAS, Associate Justice
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice

APPEARANCES:

J. D. TODD, JR., ESQ., 217 East Coffee Street, Greenville, South Carolina 29602 For the Petitioner

SCOTT P. CRAMPTON, Assistant Attorney General, Department of Justice, Washington, D.C. 20530

# C O N T E N T S

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in No. 72-1470, Bob Jones University against George P. Shultz, Secretary of the Treasury, et al.

Mr. Todd, I think you may proceed whenever you are ready.

ORAL ARGUMENT OF J. D. TODD., ESQ.,

ON BEHALF OF THE PETITIONER

MR. TODD: Mr. Chief Justice and may it please the Court:

We are here , of course, on certiorari to the Fourth Court of Appeals. We represent Bob Jones University, which is a unique university. It has a slogan, "World's most unusual university." I think it can safely be said that that is true.

It is a university which has deep religious background, deep religious roots. Its every class is opened and closed with prayer. The university admissions policy requires an examination into the religious beliefs of those who apply and who are admitted.

One of the religious beliefs of the university is that the Scriptures prohibit the intermarriage of the races and that it would be Scripturally wrong for members of different races to marry.

Based upon that religious belief, which has been

its belief since the commencement of the university in 1927, I believe, it has refused admission to blacks.

It has admitted a few orientals under a rule that those who are admitted cannot date members of other races while at the university. The university feels that at the college level is when most romantic attachments are formed between parties and when their life partners are frequently chosen.

For that reason, it has adhered to the policy that no blacks are admitted to the university.

Now, certainly, since 1942, the university has been an exempt organization under the provisions of 501C3. It has met all the requirements of 501C3 as set forth by Congress. Those requirements are, briefly, that the organization be one whose chief activity is religious, educational or charitable, that its operations inure to the private profit of no one and that it not engage in any substantial lobbying activities.

There has never been any question but that Bob Jones University met all of those requirements.

In the letter from the Collector in 1943 -- or '42 -- it was stated that it was entitled to a tax exempt status and that such tax exempt status would continue unless there was some change in the operations of the university.

There has been no change in the --

Q What was the situation between 1927, the date of its founding, and 1942 -- was it?

MR. TODD: Yes, sir.

Q The date of the letter?

MR. TODD: We are sure they had tax exempt status from the founding, but we have not been able to trace that out. We have -- the first and only thing that we find in the records of the university is the 1942 letter from the District Collector of Internal Revenue at the time. It operated in the same manner from its inception until 1942 and 1942 was no different from any other year. We just don't have any proof that were recognized as exempt by the Internal Revenue Service prior to 1942.

Q When did this practice of issuing letters such as these begin in the Department, if they are not authorized or recognized by any statute that I know of.

MR. TODD: The exact time when it was?

Q Yes.

MR. TODD: Again, I do not know. Of course, 501C3 was -- has a history of about 62 years or so.

Q Yes.

MR. TODD: And -- but when the advance letters or assurance of acceptability was instituted, I cannot say. It has been a practice for many, years, certainly since 1942 and when an organization receives such a letter, it is

entitled to be listed in the Cumulative Index of such organizations.

Q Well, even before it receives such a letter, that is, just as you suggested it, it probably -- you say it had been operating exactly the same way, or certainly was operating exactly the same way, with the same policies, from 1927 up through 1942 and beyond. So, presumably, even without a letter, it was entitled to exactly the same tax treatment prior to 1942. Wasn't it?

MR. TODD: I think that is true and I think it did receive such treatment.

Q That is, and its benefactors also had their gifts deductible from their ordinary income for tax purposes, prior to 1942.

MR. TODD: I think that is true, yes, sir.

Q I take it that you agree that the practice of issuing the letter is beneficial to the recipients of these contributions?

MR. TODD: No question about it. It is of great benefit and a privilege. I understand that. It is a thing that an organization --

Q Well, the importance is, I suppose, that it clears the air and removes any doubt on the part of donors?

MR. TODD: That is exactly what it does.

Q So a wealthy donor will ask his lawyer, will

this be deductible? And it is a very simple matter for the lawyer to find out, now.

MR. TODD: That is very true, and while the individual donors don't, perhaps, get too much, certainly, foundations do because if they make one contribution to an unauthorized or unexempt organization, their deductibility would be withdrawn, or probably would be withdrawn. So it is of vital importance to foundations and such organizations as that.

Our record shows correspondence between us and the Nationwide Foundation in the insurance company in Ohio where they had been making matching grants and where they, in view of the questionable status of the university, refused to make any more matching grants.

Q It's not the letter -- the listing of the letter in this list. Isn't that right?

MR. TODD: That is correct, sir. That's correct.

Q And you can get on the list without the letter?

MR. TODD: Oh, yes. Well, I think that is right. I don't think you can get on the list without the letter.

Yes, sir.

Q If you are on the list, then that is of some benefit.

MR. TODD: Yes, sir, it is of inestimable benefit

to an organization which is a nonprofit organization which can exist only through donations of those who are impelled to give to that organization. There, of course, is no requirement that anyone give to an exempt organization. It is a matter of personal preference and choice for each person that happens to give.

Q This whole practice, however, is extra-curricular, extrastatutory, is it not?

MR. TODD: I think that is correct, yes, sir.

Q And as far as the law goes, a donation is deductible from a donor's taxable income if the donee meets certain statutory requirements, period, regardless of any letters or any lists.

MR. TODD: Yes, that is correct, sir. That would be true.

Q Now, what if there had been no letter in this case? Would you be entitled to go into a court and ask for an injunction and have a letter issued to you?

MR. TODD: If there had been no letter, if there had been no Cumulative Index Listing I think -- no, I think not.

Q Why not? You'd be in the same position you are now because you wouldn't be on the list.

MR. TODD: Well --

Q You say being on the list is the essential

qualification for you to maintain a viable existence as Bob Jones University.

MR. TODD: That is correct. Being on the list is of vital importance because donors presumably -- well, actually, we know they won't give if we are not.

Q All right, so then I am assuming you had no letter. Therefore, were not on the list and you are operating just as you have operated since 1927 and right up through 1942. Would you be entitled, in your view, to go into a federal court and ask for an injunction, mandatory injunction requiring the Commissioner to issue you a letter that you were tax exempt? And if not, why not?

MR. TODD: Well --

Q Because if not, you'd be in the same state you are now, or you wouldn't be on the list.

MR. TODD: If -- if we asked for a mandatory injunction, the defense of soverign immunity might apply, which it doesn't in this case because we asked for no affirmative relief against any office of the United States. We asked merely for an injunction.

That is the only difference that occurs to me. That is a defense that the government pleased in this case and advanced in the district letter but now concedes as inapplicable to this particular case, the Doctrine of Sovereign Immunity.

Q Mr. Todd, as a matter of curiosity, does Bob Jones' University still have its exempt status? Has its ruling ever been withdrawn?

MR. TODD: No, sir, it has not been withdrawn.

Q Despite the lower court's order?

MR. TODD: That's right, sir. The District Court, of course, issued the injunction. The Court of Appeals reversed. But the advance assurance of the deductibility has not been withdrawn.

Q Not because of the stay outstanding?

MR. TODD: No, sir, there was no stay outstanding. We applied for a stay and the court did not see fit to grant it.

Q But the service simply hasn't withdrawn your exemption. Is that it?

MR. TODD: I think that is right. I think that is right.

Q Is your status in jeopardy in the interim, so you are not assured of their deductions?

MR. TODD: Well, our deductions -- our contributions have fallen off some. I would not say that they had dried up. As long as we have that assurance, that advance assurance, they have not dried up and we have not suffered the irreparable harm that we would have suffered had not the District Court originally granted the injunction.

Q Is the advance assurance a regulation by the Commissioner?

MR. TODD: It is a practice by the Commissioner and there is no statutory justification for it, as I understand it.

Q So you are certainly in as good a position as you would be if there had been no -- never had been any letter, aren't you?

The fact is, you are in a better position because as of now, you are still on the so-called list.

MR. TODD: Yes, on the so-called "list." Yes, sir. I don't think we would have been on the so-called "list," had we not had the letter to start with.

Q No, apparently not, but if you hadn't had the letter, you'd be in just as bad a position -- a worse position than you are now, from the point of view of attracting the beneficience of supporters and benefactors.

Q Except that the Internal Revenue Service, by revoking or purporting to revoke your clearance, has, in advance, announced that it doesn't think that your organization qualifies.

MR. TODD: That is correct, sir, and --

Q And so that any people who were thinking about giving money to you know they are going to have a fight on their hands.

MR. TODD: That's correct and, while, as I said a few moments ago, the individual donors, the small individual donors, I don't think that would make a lot of difference, it does make a lot of difference to foundations. I think that is where the real damage came as a result of the announcement by the IRS that it would be withdrawn.

Q It is sort of like one litigant having litigated with the IRS and lost; one donor has litigated his tax return as lost. Other possible donors are going to be put off a little.

MR. TODD: I think that is correct, yes, sir. I think other possible donors would approach it with caution and I think the donors that have given in the interim are people who were firmly motivated to give and who were not altogether swayed by the deductibility of their contributions.

But as I say, donations and contributions have been much less free as they were before. Now --

Q You mentioned foundations a couple of times. Do I understand -- and I think I have understood -- if a gift is made by a foundation to an institution that does not qualify, then the tax status of the foundation itself might come into question or be altered. Is that it?

MR. TODD: It would come into question.

Q Unlike an individual donor.

MR. TODD: That is correct, sir. That is correct.

That is a point of vital importance that a foundation not give any gift to anyone whose eligibility --

Q Doesn't qualify.

MR. TODD: -- under 501C3 is in doubt.

At any rate, this announcement from the IRS to the effect that the IRS could no longer grant advance assurance of deductibility to schools who practised a racially-discriminatory policy, no matter why they had that policy, resulted in this law suit.

There was no act of Congress that added that provision to 501C3 as one of the conditions for an exempt organization.

Congress had very specifically set forth what was necessary to be an exempt organization and that didn't happen to be one of the requirements that was set forth.

At any rate, in the trial contention and the lower court held that the Commissioner exceeded his statutory authority given him, that he has authority to promulgate regulations, but not to change laws and that that is a matter for Congress to decide and we, of course, contend that that is absolutely correct.

Now, it is our -- we must concede that Bob Jones University has a remedy at law. Bob Jones University, if its exempt status is destroyed, will be in a position where it will have to pay not only unemployment taxes, but income taxes

as well and we --

Q Income taxes on what?

MR. TODD: On the income from operating the university, sir.

Q I see, tuitions, you mean?

MR. TODD: Yes.

Q If you make a profit.

Q Yes.

MR. TODD: Yes. Well -- I think it is one of the university's --

Q That is pretty hard to do, isn't it?

MR. TODD: Yes, sir. This university, as I said, is one of the world's most unusual universities and it has made a profit which has been plowed back into plant and other --

Q You mean, after actually -- after depreciation?

MR. TODD: No, not bothering about depreciation, no.

Q I didn't think they had.

MR. TODD: They haven't bothered about depreciation.

Q Well, haven't you made some reference somewhere along here that your income taxes would be very substantial?

MR. TODD: Yes, sir. Yes, sir.

Q And do you know that, in view of what you

have just said about not using depreciation and the like?

MR. TODD: We have been exempt, so why bother with depreciation? Bookkeeping procedures have not -- the auditors have not bothered with depreciation at all because depreciation is --

Q I know, but you say your income taxes "would be substantial."

MR. TODD: Yes, sir.

Q If you had to go about filing an income tax return, you certainly are going to start taking account of depreciation.

MR. TODD: No question about that and, perhaps, they would not be as substantial as we think, but we would still have to pay them and that --

Q Well, of what does your income consist besides tuition? Certainly not your donations; your contributions are not income.

MR. TODD: Tuition, room and board, the operation of the Student Center and those things where they sell drinks and -- soft drinks, I might add.

[Laughter.]

MR. TODD: To the students and faculty.

Q And the athletic program?

MR. TODD: Not interscholastics. They do have intermural athletics. They have --

Q But nothing that earns money in a stadium or anything?

MR. TODD: No, no, sir.

Q Well, I suppose you have -- it would be very unusual if you didn't have investments on which you had income.

MR. TODD: Well, I --

Q Any private institution of learning that I that I am familiar with has. They never have enough, but they have a good deal.

MR. TODD: They do have. They do have investments which they have realized income from.

Q Certainly.

MR. TODD: At any rate --

Q But, obviously, it is an institution, as a corporate entity, organized not for profit. Is that not so?

MR. TODD: I don't think there is any question about that. The record so says and I don't think that there is ever any question but what it is an organization operated not for anyone's individual profit. It inures to the profit of no individual.

The university's beliefs have caused it some detriment. It could not conscientiously sign a certificate of compliance under the Civil Rights Act of 1964 and, therefore, it voluntarily has foregone all grants of any kind or

nature. It received no grants of any kind or nature from the Federal Government, any branch of the Federal Government or any branch of the State Government. It absolutely goes it on its own, with its own operation and its own donors. It has no gifts or grants of any kind --

Q Do you have a large student body?

MR. TODD: Sir?

Q What is the size of the student body?

MR. TODD: 3,500 and a faculty of about 650.

Q And all undergraduates? No graduate school?

MR. TODD: Yes, no graduate degree, all undergraduates.

Q Mr. Todd, assuming you didn't have the procedure of the letter and the listing and IRS issued a public statement that from now on you were not allowed deduction for contributions to Bob Jones University. What could you do?

MR. TODD: That, substantially is what this case is, your Honor, except that we have the letter and we have the --

Q Would you ask for an injunction?

MR. TODD: Yes, sir.

Q Against what?

MR. TODD: Against the withdrawal of the exempt status of Bob Jones University.

Q The withdrawal of the tax exemption, tax

deduction, rather, to the contributor. You wouldn't think that ran parallel to the injunction statute?

MR. TODD: No, sir, I wouldn't think so.

Q Why not?

MR. TODD: Because --

Q It involves collection of taxes.

MR. TODD: As the District Court said in this case, it involved taxes only very remotely.

Q I'm not talking about this case. I am talking about my hypothetical case.

MR. TODD: Yes, sir.

Q Wouldn't that be barred by the injunction statute?

MR. TODD: Under the literal terms of the injunction statute, any case involving --

Q Oh, you agree that would be clearly a tax case?

MR. TODD: I agree that it would be barred by the anti-injunction statute with no court rule, which is --

Q Now, you get to my next question, which is, what is the difference between that and this?

MR. TODD: The difference in that and this is that the university --

Q In '27 didn't have any letter and didn't have any listing.

MR. TODD: Yes.

Q In '42, had a letter and had listing. And now has no letter and no listing. Now, that is different from my hypothetical in what fashion?

MR. TODD: For one thing, prospective donors without the letter and without the listing, would not be inclined to donate. I think that is the big difference.

Q I am talking about as to the anti-injunction statute.

MR. TODD: As to the anti-injunction statute, I don't suppose there is too much difference in the two situations except -- except that without the letter and without the advance assurance of deductibility, we would have been paying taxes and our donors would not have been entitled to deductions from their income.

At any rate, if we read the terms of the anti-injunction statute literally, there is no exception. There is no exception. This Court has recognized that there are exceptions. It created exceptions in the Hill case, Hill against Wallace . It created exceptions in Miller against Standard Nut Margarine. And it created an exception in Enochs against Williams Packing.

Now, the government suggests that if the rule in Enochs against Williams Packing is to be changed, then it should be by the legislature rather than by court.

I respectfully invite the Court's attention to the fact that the rule, Enochs against Williams Packing, is not a legislative rule. It is a court-originated rule. It is a rule that the legislature had nothing to do with, but the Court, in its inherent power to do justice between the government and the citizens, evolved the rule in Enoch against Williams.

Q So really, then, it seems to me, not the letter or the list that you are concerned about, but what the letter and the list represent. That is, the letter and the list are merely declarative. One is a private communication and the other is a public communication, stating what is the legal ruling of IRS.

MR. TODD: That, in effect, is correct, but we have --

Q But it is the ruling that you are concerned about, isn't it?

MR. TODD: That is right. That is right. The ruling is what we are vitally concerned about, plus the publication of that news. If the ruling is made in a vacuum and not publicized, if the donors, don't know about the ruling and and we can't get it to them in any effective way, then, of course, we are concerned about it. We are --

Q You said earlier that the ruling -- the publication and the letter are beneficial. If they are

beneficial, I suppose you mean or meant to say they are beneficial if they have the right content.

MR. TODD: Well -- well, that's right, and the ruling issued to us does have the right contents and we are listed in the Cumulative Index, or the list of exempt organizations. We are listed there and it is of benefit to the university. The position of the university really is that the rule in Enoch against Williams Packing has no real application to exempt organizations. As was pointed out in one of the previous arguments, the anti-injunction statute was passed in 1867, long before we had any question about exempt organizations, charitable deductions or income tax, for that matter. And --

Q There has been no hesitation in applying the anti-injunction statute to income taxes, even though income taxes were --

MR. TODD: No question about that, your Honor. It does apply to income taxes and it does apply to exempt organizations as the IRS attempts to enforce it, but we think that as far as exempt organizations are concerned, whose source of revenue can be dried up by a mere withdrawing of that advance assurance of deductibility, who can face ruin as the Micah brief in the Americans United case pointed out and it is a matter that Mr. Thower, who was Commissioner at the time, made a speech in Dallas that said, "We understand

and realize that our mere refusal to rule on an application can doom an organization," that under those circumstances -- under those circumstances a different rule than the one applied in Williams Packing should be adopted. Obviously, Williams Packing goes a long ways to protect the Internal Revenue Service and the receipt of the government revenues and obviously --

Q The statute went that far in the district, didn't it?

MR. TODD: Oh, that's right. The statute went that far. It went farther, I think.

Q It went even farther, didn't it?

MR. TODD: That's right, it certainly did, sir.

Q Well, so what -- you are asking us to repeal the statute? Is that it?

MR. TODD: No, sir. No, sir. I am asking the Court to exercise inherent jurisdiction of the Court to fashion a remedy that would be fair and applicable to the Internal Revenue Service and to the charitable or exempt organizations.

Q Your fundamental aim is to keep your letter in force so that the Internal Revenue Service, according to its usual practice, would be forbidden or at least would refrain from collecting taxes from your donors?

MR. TODD: That is correct, sir.

Q And so the heart of the case is whether the Internal Revenue Service should or shouldn't be permitted to collect taxes from your donors, based on their gifts?

MR. TODD: That is correct, your Honor, and I don't think that involves a question of assessment of a collection of a tax against Bob Jones University, as is apparent from the record in this case. Bob Jones University can pay every tax that the government intends to assess and collect against it by purely and simply abandoning its religious convictions and changing its admissions policy. The record is clear from the deposition of Mr. Connett, the assistant collector of Internal Revenue in charge of exempt organizations, to the effect that if Bob Jones University changes its admissions policy we would not revoke its advanced assurance of deductibility.

So, really, we are not talking, in my opinion, we are not talking about taxes. We are talking about, as Mr. Crampton remarked in a previous case, "Some people try to use the Internal Revenue Service as a club against those that they don't like or with whom they have differences.

We are attempting to keep the Internal Revenue Service from using the club of withdrawing our advanced assurance of deductibility to adopt an admissions policy which is not dictated by any act of Congress, an admissions policy which is contrary to the firm and publicly stated and

publicly stated and long-held religious beliefs of the university.

MR. CHIEF JUSTICE BURGER: Mr. Todd, you are down to four minutes now, so if you want to save some rebuttal time, you may do that.

MR. TODD: All right, sir.

MR. CHIEF JUSTICE BURGER: Mr. Crampton.

ORAL ARGUMENT OF SCOTT P. CRAMPTON, ASST. ATTY. GENERAL

MR. CRAMPTON: Mr. Chief Justice and may it please the Court ---

Q Is there any real difference in these two cases, Mr. Crampton?

MR. CRAMPTON: No, I think that the fundamental procedure issue is the same and I think that this case perhaps even more strongly emphasizes the need for the application of the injunction.

Q This involves C4 as well as C3?

MR. CRAMPTON: No, C4 is not in this case.

Q Or in the other one, either?

MR. CRAMPTON: Yes. The other one was exempt under 501C4. This one is not exempt under 501C4.

Q I see.

MR. CRAMPTON: And the question is whether it is exempt from the 501C3.

Q Well, it looks like this organization is not

exempt under either, your claim is.

MR. CRAMPTON: That is our position. That is the position the Commissioner probably would take. I'd say there were certain administrative steps that were still to be explored, but the injunction stopped all that.

Q Yes.

MR. CRAMPTON: But --

Q So this institution, the Commissioner would probably hold, was itself taxable --

MR. CRAMPTON: That's right.

Q -- on its own net income, unlike the previous case.

MR. CRAMPTON: Right, and that is the point I'd like to make here. I am somewhat shocked, as I think Mr. Justice White indicated, that this taxpayer was not only making money, the accountant that handled its records for some 25 years has filed here in an affidavit saying that this corporation would owe $750,000 in tax for one year and $500,000 in tax for another year, simply income tax and the purpose of this act is to stop the Commissioner of Internal Revenue from attempting to assess that. And I say, this comes in squarely under the tax payer's trying to stop the assessment of tax and the Williams Packing case, the exceptions in the Williams Packing Case do not apply here and it seems to me that there is no question but what there is a

chance here of the Commissioner's prevailing, so that that possibility would not --

Q Mr. Crampton?

MR. CRAMPTON: Yes.

Q When did this letter business start? Do you know?

MR. CRAMPTON: I'm not sure, either. We were looking at it when you first asked the question.

Q Did you find out?

MR. CRAMPTON: No, I didn't find it, but I did find that we have cited in the briefs an historical review of this ruling process. It is in one of the New York University Institute tax institutes in an article that was prepared by former Commissioner of Internal Revenue Mortimer Kaplan and I don't have that with me, but I think that will answer. My recollection is that it must go back into the 20's anyway.

Q Do you still have the one-year waiting period for for a new non-profit corporation?

MR. CRAMPTON: I believe that was changed by statute awhile back. You can come in and make a preliminary showing of what you plan to do and then as I recall, you come in with a sort of a follow-up situation and say we did do it.

Q But this is true, you still don't go on the list for a year, as I recall. At least, that was the case

at one time, when I was trying to prosecute.

MR. CRAMPTON: That used to be the case. I am not sure whether that is true any more. I didn't think it had.

I wanted to answer a question that was asked before about whether or not this injunction had been revoked. It has not. The District Court entered the injunction and when it went to the Court of Appeals, there was an application for a stay after the Court of Appeals handed down its opinion. That was denied and then when the matter got back to the District Court, petition for certiorari had been filed and it was the position of the District Court that it no longer had jurisdiction and, therefore, as it stands now, if the Commissioner of Internal Revenue attempted to do anything, he would run the risk of being in contempt of court.

Q That is why the action was withdrawn? Is that it?

MR. CRAMPTON: That is it, yes. It hasn't been and so these folks have been having an advantage for three years that this has been pending of being able to remain on the list and get the benefit of the tax-exempt dollars from the donors.

Q You said if the Commissioner attempted to do anything, he would be -- run the risk of being in contempt of court. Well, that's a little bit broad.

MR. CRAMPTON: Well, I mean contrary to the injunction order.

Q What is the injunction order? Is it in the Appendix?

In other words, could you attempt to disallow a deduction for a taxpayer who had made a gift in some previous year to Bob Jones University without being in contempt?

MR. CRAMPTON: Oh, not for a previous year, because they've been on the list and under that list, any donor could look to that list and that is his license, so to speak, to make a contribution.

Q That is correct. That is practice.

Q That is practice, but it is not --

MR. CRAMPTON: Well, I think the Internal Revenue Service has sort of held off.

Q Do you think that is estoppel?

MR. CRAMPTON: I would think so. I would think it would be very poor tax administration for us --

Q Well, that isn't what I asked you, whether it is legally permissable. I thought it was just -- would it be legally permissable for them to go back and attempt to litigate a deduction for a prior year that a donor had taken?

MR. CRAMPTON: After they had, in effect, held out to the donor that if he relied on that --

Q This was with respoect to an organization on

the list.

MR. CRAMPTON: I think estoppel would apply there. There would be reliance on an act to the detriment of the -- now, whether estoppel goes against the government, you get into a different -- perhaps a, into a different set of rules.

Q There are cases that say it does not, are there not?

MR. CRAMPTON: Yes, there are and that is why I can't --

Q And, certainly, the service has been known to change its mind.

MR. CRAMPTON: Yes, but I don't think you have found the service changing its mind with respect to rulings when they have been made and under such circumstances, the taxpayers were entitled to rely on them. That is, the service has issued rulings, we'll say, to taxpayer A and when taxpayer B comes in, they've said, no, we've changed our mind but they still will not go back and assess the deficiency against taxpayer A, who may have acted in reliance on that ruling under, maybe, a corporate reorganization or something of that nature.

Q To get specific, suppose a taxpayer asserts a deduction that he made to Bob Jones University in 1973, in a '73 return yet to be filed? This took place since the Court of Appeals ruling. I take it, then, the service feels

it cannot challenge that deduction because the university is still on the list?

MR. CRAMPTON: That would be my position and I --

Q Well, I was just looking at the injunction.

Q Where is it?

Q On page A-128. "You are hereby enjoined pendente lite from revoking or threatening to revoke the tax exempt status of plaintiff and further enjoined pendente lite from withdrawing advanced assurance deductibility of contributions solely because of the admissions policy of plaintiff pending a final hearing and determination of this cause on the merits," and you have the feeling, at least, or are operating on the impression that that injunction is still extant against the service. Is that it?

MR. CRAMPTON: Yes.

Q And why is that? It was reversed in the Court of Appeals.

MR. CRAMPTON: Yes, and they came to this Court for a stay and I believe Mr. Justice Burger denied the stay. It went back to the -- Mr. Chief Justice Burger -- and it went back to the lower court and by that time it was in the Supreme Court on a petition of certiorari and the District Court said, "I feel I no longer have jurisdiction," so he refused to revoke the order which he had entered.

Q Well, there isn't any injunction outstanding,

is there?

MR. CRAMPTON: Well, that -- what?

Q Was the Court of Appeals' reversal held as an injunction?

MR. CRAMPTON: Well --

Q An unstayed reversal?

MR. CRAMPTON: -- this is the position the District Court took.

Q Did the ending ever come down from the Fourth Circuit?

MR. CRAMPTON: I believe it did but --

Q Well, I would think the District Court perhaps was out --

MR. CRAMPTON: It was out of its jurisdiction.

Q -- of its jurisdiction but it is within the jurisdiction of another court that reversed it.

MR. CRAMPTON: Well, anyway, as a practical matter we haven't -- the Commissioner has not done anything and --

Q Whether or not you can, you haven't.

MR. CRAMPTON: We haven't.

Q So, if nothing else, it is at least a matter of deference to the importance of the problem that is pending in the courts.

MR. CRAMPTON: That is right and that is why we

are here hoping that this Court will give us some guidance that we can use and I'll say we have had a multitude of these cases coming along. We feel the proper role of this injunction procedure is a very important one in the administration of the tax laws and we think that the remedy here is legislation and it is not allowance of injunctions because I think we are -- as I've indicated earlier, this will only lead to chaos.

I think I have covered the point. I owe the Court time for review now.

MR. CHIEF JUSTICE BURGER: You have about three minutes more, Mr. Todd.

REBUTTAL ARGUMENT OF

J. D. TODD, JR., ESQ.,

MR. TODD: I don't believe there is any question but what the IRS can apply the loss of deductibility retroactively. They don't have to do it, but I believe they have the authority to do it. I belive the courts have so held in many cases and the IRS has done it on occasion.

We feel that even if Williams Packing is the law, even if it applies to exempt organizations, that we come within Williams Packing. The District Court and the Court of Appeals both held that we had irreparable injury, that we would lose deductions which we could never recover and --

Q Well, you can't -- quite apart from any

statute, you -- there can't even be an injunction unless there is an irreparable injury.

MR. TODD: That's right.

Q I mean, if that were the only test, why, there wouldn't need to be any statute because that is a well-known and well-settled, equitable doctrine.

MR. TODD: No question about that. But in addition, we feel that we meet the other test. We do not believe that the government can prevail, ultimately, in this case. And our feeling for that is because the action of the IRS, in effect, is an attempt to place a tax upon the exercise of a religious belief. It is an exaction upon religious belief which we feel runs absolutely contrary to Sherbert against Verner, which runs contrary to Murdock against Pennsylvania, which runs contrary to --

Q It may be doing this as an establishment.

MR. TODD: Well, sir, I don't believe we are an establishment. I don't believe that the tax-exempt status put --

Q Well, it is a substantial benefit the government is conferring on it, isn't it?

MR. TODD: Well, sir, I believe this Court said it was an action of benevolent neutrality and to say it is not a substantial --

Q It's a property tax.

MR. TODD: Sir?

Q That was property tax.

Q That was an exemption.

MR. TODD: Yes, sirs, but the opinion also discusses income tax and says it is in the same category and I'll admit that the amount involved would be considerably different as far as income tax and property tax is concerned, but it is still a question of benevolent neutrality in Walz case, we think, and it is an attempt to tax the exercise of a religious belief which we feel is in violation of the First Amendment of the Constitution and the government cannot, ultimately, prevail on the merits. If we prevail on the merits and our deductibility has been withdrawn for two or three years, we have lost all the donations that we would have gotten during that period of time, a very serious matter as far as we are concerned.

Q Who is the -- and this is pure curiosity -- who was the -- who is or was the Bob Jones after whom this university was named?

MR. TODD: Well, the original Bob Jones was the founder of the university. He died at the age of some-85 three or four years ago. His son, Bob Jones, Junior, was the President of the university until his father's death and at his father's death, his son, Bob Jones the III is the President of the University.

Q Named after the founder, in other words.

MR. TODD: Named after the founder, yes, sir.

Q How long has it been in existence, now, altogether?

MR. TODD: Since about 1927, I believe, sir.

Q Since 1927. That's what you said.

MR. TODD: Yes, sir.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Todd.

Thank you, Mr. Crampton.

The case is submitted.

[Whereupon, at 1:49 o'clock p.m., the case was submitted.]