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Recommended Citation

John D. Aldock (1974) "Church Lobbying: The Legal Constraints," *The Catholic Lawyer*: Vol. 20 : No. 4 , Article 4.
Available at: <https://scholarship.law.stjohns.edu/tcl/vol20/iss4/4>

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CHURCH LOBBYING: THE LEGAL CONSTRAINTS

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INTRODUCTION

According to H. L. Mencken, the first use of the term "lobby" in a political sense was recorded in 1829 when it was applied in the phrase "lobby agent" to the hired privilege-seekers who had begun to frequent the legislative corridors at Albany. Soon thereafter, Thurlow Weed and others gave to lobbying professional status, established method, and a persisting notoriety that it has had ever since.¹

Despite the pejorative connotations of the term, lobbying—the efforts of organized interests to influence government policy—is an inseparable part of the political process and is in part encompassed in the right "to petition the Government for a redress of grievances" guaranteed by the first amendment to the United States Constitution. While religious organizations have always taken a low profile in their lobbying activities, we all know that church groups have in the past and will continue in the future to attempt to influence legislation bearing on matters that concern their organizations and their members. Indeed, the Chief Justice, writing for the Court in *Walz v. Tax Commission*,² said: "Adherents of particular faiths and individual churches frequently take strong positions on public issues including . . . vigorous advocacy of legal or constitutional positions. Of course, churches as much as secular bodies and private citizens have their right."

You have been informed by Robert Lynch about the extensive lobbying activities contemplated by the National Committee for the Human Life Amendment (NCHLA). As a result of the same considerations that brought that organization into being, I suspect that many of your Bishops will be asking you for advice on what they can and cannot do in this area, and for some of you this may be a new area of concern. What I hope to do is to briefly chart out what I see as the relevant considerations and legal limitations on church legislative activities.

The major legal constraints on church activity in this area are, it seems to me, in two forms: (1) those in the Internal Revenue Code which

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¹ E. LANE, *LOBBYING AND THE LAW* 19 (1964).

² 397 U.S. 664, 670 (1969).

condition the tax exemption of a religious organization; and (2) those embodied in the federal and state statutes that regulate legislative or lobbying activity.

TAX CONSIDERATIONS

It is my understanding that all of the dioceses are tax exempt organizations under section 501(c)(3) of the Internal Revenue Code.³ That section exempts from federal taxation:

(3) *Corporations*, and any community chest, fund, or foundation, organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes, or for the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private shareholder or individual, *no substantial part of the activities of which is carrying on propaganda, or otherwise attempting, to influence legislation, and which does not participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of any candidate for public office.*⁴

The key language, of course, is "no substantial part of the activities of which is carrying on propaganda, or otherwise attempting, to influence legislation." The qualification of charities to receive contributions which their donors may deduct for federal income tax purposes is limited by an identical statutory provision.⁵ And the statutes governing the estate and gift tax deductions for charitable contributions contain the same limitation.⁶

The proviso against substantial legislative activities was written into the Internal Revenue Code in 1934. In part the Code provision was a reaction to Judge Hand's decision in *Slee v. Commissioner*.⁷ In that case the court held that the American Birth Control League was not entitled to a charitable exemption because the fact that it disseminated propaganda to legislators and to the public aimed at the repeal of laws preventing birth control, made its purpose not "exclusively" charitable, educational, or scientific. The further limitation on exempt status under section 501(c)(3) against participation or intervention in political campaigns on behalf of candidates for public office was added to the Code in 1954.

The policy behind these limitations is that the government should be

³ INT. REV. CODE OF 1954, § 501(c)(3).

⁴ *Id.* (emphasis added).

⁵ *Id.* § 170(c)(2)(D).

⁶ *Id.* §§ 2055(a)(2), 2106(a)(2)(A)(ii), 2522(a)(2). It should be noted that bills are now pending to amend these sections of the Code. One bill, H.R. 12037, introduced by Congressman Conable, would put a \$500,000 limit on lobbying activities (broadly defined) by tax exempt organizations. Churches are excluded from the bill as introduced and would continue to be governed by the provisions in the present Code.

⁷ 42 F.2d 184 (2d Cir. 1930).

neutral in political affairs and that substantial activities directed to attempts to influence legislation should not be subsidized by the treasury.⁸

Despite the fact that the proviso against substantial legislative activity has been part of our law for more than 30 years, it has never really been defined by the IRS or by the courts. The Treasury regulations dealing with the legislative activity limitation contained in section 501(c)(3) state *inter alia* that an organization is not operated exclusively for exempt purposes if it is an "action organization" as defined in the regulations. They then go on to define "action" organization in the terms of the statute as one where "a substantial part of its activities is attempting to influence legislation by propaganda or otherwise."⁹ Not surprisingly, the Senate Finance Committee in 1969 observed that "the standards as to the permissible level of activities under present law are so vague as to encourage subjective application of the sanction"¹⁰

Not only does there exist no ready quantitative guide as to what percentage constitutes a "substantial part of the activities" of an organization, but some courts have eschewed a percentage test on this question entirely.

In the recent case of *Christian Echoes National Ministry, Inc. v. United States*,¹¹ the Tenth Circuit stated:

The political activities of an organization must be balanced in the context of the objectives and circumstances of the organization to determine whether a *substantial* part of its activities was to influence . . . legislation. . . . A percentage test to determine whether the activities were substantial obscures the complexity of balancing the organization's activities in relation to its objectives and circumstances.¹²

The court observed that the activities prohibited by section 501(c)(3) constituted "an essential part of the program of Christian Echoes" and that such activities "were not incidental, but were substantial and continuous."¹³ In that case the record showed that more than 50% of its gross receipts was devoted to attempts to influence legislation and to participate in political campaigns. Accordingly, Christian Echoes was found to be not entitled to the exemption.

⁸ *Christian Echoes Nat'l Ministry, Inc. v. United States*, 470 F.2d 849, 854 (10th Cir. 1972), *cert. denied*, 414 U.S. 864 (1973). See also *Commarano v. United States*, 358 U.S. 498, 512 (1959).

⁹ Treas. Regs. § 1.501(c)(3)-1(c)(3)(ii) (1974). The regulations define "legislation" very broadly and include constitutional amendments. The regulations also state that an organization will be regarded as attempting to influence legislation if the organization "(a) Contacts, or urges the public to contact, members of a legislative body for the purpose of proposing, supporting or opposing legislation; or (b) Advocates the adoption or rejection of legislation."

¹⁰ S. REP. NO. 91-552, 91st Cong., 1st Sess. 47 (1969).

¹¹ 470 F.2d 849 (10th Cir. 1972), *cert. denied*, 414 U.S. 864 (1973).

¹² *Id.* at 855.

¹³ *Id.* at 855-56.

In *Seasongood v. Commissioner*,¹⁴ however, a Good Government League was held qualified under section 501(c)(3) where "something less than 5% of the time and effort of the League was devoted to the activities that the Tax Court found to be 'political.'"¹⁵ In the few cases in which courts have found that a substantial part of an organization's activities have been political, they have done so upon observing that legislative and political goals were the principal purpose for the organization's existence. Thus in *League of Women Voters v. United States*,¹⁶ the court held that "the influencing of legislation is the League's main purpose and reason for being." And in *Krohn v. United States*,¹⁷ the court held that a medical society had engaged substantially in noncharitable political activities because "it would not be satisfying its original purposes if it were not seeking to promote the welfare of the profession and the welfare of its individual members" and "much of its activity has taken this form."¹⁸

Another recent case of some interest is "*Americans United, Inc. v. Walters*,"¹⁹ in which the IRS had revoked a ruling holding Protestants and Other Americans for Separation of Church and State exempt under section 501(c)(3) and qualified to receive deductible contributions under section 170(c)(2), basing the revocation on the organization's legislative activity. To the court of appeals, Americans United argued that the Service's action constituted unconstitutional discrimination against it because larger charities, with more extensive programs of exempt activities, could carry on the same quantum of legislative activity without loss of their entitlement to receive deductible contributions. The court held that the contention presented "substantial constitutional questions" and remanded the case to the district court with instructions to convene a three-judge panel. In discussing this issue Judge Wilkey, concurring, stated:

In short, it is certainly arguable that small groups are not being treated differently by § 501(c)(3) because they are small, but because they are obviously operating for a different purpose if they devote their comparatively small funds on a much different proportionate basis to propaganda for legislation.²⁰

This may well be an argument a diocese would make if faced with criticism

¹⁴ 227 F.2d 907 (6th Cir. 1955).

¹⁵ *Id.* at 912.

¹⁶ 180 F. Supp. 379, 383 (Ct. Cl. 1960). See also *Kuper v. Commissioner*, 332 F.2d 562 (3rd Cir.), cert. denied, 379 U.S. 920 (1964) (also involving the League of Women Voters).

¹⁷ 246 F. Supp. 341 (D. Colo. 1965).

¹⁸ *Id.* at 349. See also *Hammerstein v. Kelley*, 349 F.2d 928 (8th Cir. 1965); *Haswell v. United States*, 62 Private Fnds. Rpts. 9897, 9903 (Ct. Cl. Oct. 30, 1973) (evidence indicated that the organization was spending approximately 20% of its budget on political and legislative activities).

¹⁹ 477 F.2d 1169 (D.C. Cir.), rev'd, 416 U.S. 752 (1974).

²⁰ *Id.* at 1184 (Wilkey, J., concurring).

from a smaller organization.²¹

In sum, on the basis of the *Seasongood*²² decision and in the absence of specifically articulated IRS criteria to the contrary, expenditures of no more than 5% of a diocese's total expenditures for legislative lobbying could not, in my view, be taken to constitute a "substantial part of the activities" of the diocese for purposes of section 501(c)(3). And even if such expenditures rose to as much as 15% of total expenditures the "substantiality" test as applied by the courts would not result in loss of exempt status.²³ In addition, any attempt to withdraw the tax exemption of the Catholic Church for the expression of views on abortion or other moral issues would raise very grave questions under the first amendment.²⁴

THE FEDERAL REGULATION OF LOBBYING ACT

Most of you will not come in contact with the Federal Regulation of Lobbying Act,²⁵ leaving Jim Robinson and Bud Consedine's offices to deal with the congressional scene. It may be useful, however, to deal briefly with the federal statute since it has some similarities with many of the state statutes.

The Federal Regulation of Lobbying Act states that it applies only to any person who "directly or indirectly, solicits, collects, or receives money or any other thing of value to be used principally to aid, or the principal purpose of which person is to aid . . ." in the passage or defeat of legislation by the Congress.²⁶ While Lyndon B. Johnson is reported to have characterized the Federal Regulation of Lobbying Act as "more loophole than law," nevertheless, the Act has of late caused the USCC some concern.

In November of 1973, certain individuals and a group called "Women's Lobby, Inc." brought suit in the United States District Court for the District of Columbia against Monsignor McHugh, of the Family Life Division of the USCC, and the USCC itself seeking to enjoin the USCC and Father McHugh from taking any action with regard to federal legislation without first registering under the Act. After successfully persuading Judge Aubrey E. Robinson, Jr. that a preliminary injunction should not be granted, we moved for summary judgment. In support of

²¹ See also *Haswell v. United States*, 62 Private Fnds. Rpts. 9897, 9903 (Ct. Cl. Oct. 30, 1973).

²² 227 F.2d 907.

²³ An alternate approach, and the one utilized in the case of NCHLA, would be to form a separate organization for lobbying purposes and to obtain an exemption for that organization under § 501(c)(4) of the Code. While the substantial legislative activity proviso does not apply to organizations exempt under § 501(c)(4), contributions to a 501(c)(4) organization are not tax deductible. Moreover, the diocese, a 501(c)(3) organization, would still be subject to the substantial legislative activity proviso with respect to its contribution to the 501(c)(4) organization.

²⁴ See Note, *Religion in Politics and Income Tax Exemption*, 42 *FORDHAM L. REV.* 397 (1973).

²⁵ 2 U.S.C. § 261 *et seq.* (1970).

²⁶ *Id.* § 266.

that motion we relied, *inter alia*, on arguments that: (1) the exclusive remedy for enforcement of the Act is by way of criminal proceedings and no basis had been shown for the court "implying" a civil remedy; (2) since it is neither a "principal" nor a "substantial" purpose of the USCC nor Monsignor McHugh to influence the passage or defeat of legislation by the Congress of the United States, and neither the Conference nor Monsignor McHugh "solicit, collect or receive money" for such purposes, the reporting²⁷ and registration²⁸ provisions of the Federal Regulation of Lobbying Act do not apply to them by virtue of section 266 thereof;²⁹ and (3) to construe the Act to require the USCC to register would impair rights guaranteed by the first amendment to the Constitution. With its usual dispatch the district court has had our motion for summary judgment under advisement since January 11, 1974.³⁰

For those interested in the federal regulatory scheme the Act must be read in light of the gloss placed on it by the Supreme Court in *United States v. Harriss*.³¹ In that case the Court, in upholding the constitutionality of the Act, held that there are three prerequisites to coverage:

- (1) the 'person' must have solicited, collected, or received contributions;
- (2) *one of the main purposes of such 'person' or one of the main purposes of such contributions*, must have been to influence the passage or defeat of legislation by Congress; (3) the intended method of accomplishing this purpose must have been through direct communication with members of Congress.³²

In interpreting the "principal purpose" requirement of section 266 the Supreme Court also observed that the quoted phrase "*does not exclude a contribution which in substantial part is to be used to influence legislation through direct communication with Congress or a person whose activities in substantial part are directed to influencing legislation through direct communication with Congress.*"³³ Interestingly, the Court, in footnote 13, seemed to equate the "principal" or "substantial" purpose test with the substantial activities criterion in the tax exemption statutes that preceded section 501(c)(3).

STATE REGULATION OF LOBBYING

Today all of the states have some form of statutory regulation which,

²⁷ *Id.* § 264.

²⁸ *Id.* § 267.

²⁹ *Id.* § 266.

³⁰ On May 21, 1974, Judge Robinson dismissed the complaint in the case of *Women's Lobby, Inc. v. McHugh*, Civ. No. 2025-73 (D.D.C.), for lack of jurisdiction and failure to state a claim upon which relief could be granted. No appeal was taken by the plaintiff from the decision.

³¹ 347 U.S. 612 (1954).

³² *Id.* at 623 (emphasis added).

³³ *Id.* at 622 (emphasis added).

directly or indirectly, affect individuals or groups who attempt to influence legislation.³⁴ While you will, of course, want to consult the particular statute in your jurisdiction, it may be useful to have a general overview of the various types of state regulatory schemes.

About half the states have legislation that is limited to defining certain prohibited acts, *e.g.*, bribery, and imposing sanctions for various improper practices. For example, in most jurisdictions contingent fee lobbying is illegal. Since there is no registration requirement under these statutes and since the prohibited practices are things that none of you would even consider doing, compliance in these states is a relatively easy matter. Up until recently at least Minnesota had a statute of this variety. As many as 16 states have constitutional provisions affecting lobbying. As a rule these are also provisions dealing with prohibited practices.³⁵

In other jurisdictions the statutes are similar to the federal act in that they require that certain formal steps, usually including some form of registration, be undertaken before lobbying activities may be undertaken. Registration is usually with the secretary of state, although in some jurisdictions it is the attorney general or some other designated official. Since the theory of registration is that publicity of the lobbying activities will convince the lobbyist to act "properly," all the information filed with state officials is open to public inspection. The information called for generally includes name and address of employer, duration of employment, how much the lobbyist has been paid for his services and what expenses are included, and what legislation the lobbyist has been hired to support or oppose. Some states require registration of both the lobbyist and the employer. Many states require the filing of financial statements in addition to registration. Several states place a time limit on registration such as before commencing any lobbying activity or within one week of being employed.

Some states draw a distinction between "legislative counsels" and "legislative agents." The former is generally defined as a person who for compensation appears at a public hearing before any committee in regard to proposed legislation and the latter is a person who does any other act with regard to legislation except appear before a committee or activities that are necessary incidents to such appearance. In some cases only the legislative agent need register, while in others the distinction appears to have little significance except with regard to the types of financial reports that must be filed. A few states require that a specified number of copies of all written statements provided to members of the general assembly be filed with designated state officials.

³⁴ See generally Note, *Lobbying—Multi-State Statutory Survey*, 38 NOTRE DAME LAW 79 (1962); Annot., *Lobbying Regulations*, 42 A.L.R.3d 1046.

³⁵ See, *e.g.*, Md. CONST. art. III, § 50.

Interestingly, the federal act excludes coverage of appearances before "a committee of the Congress of the United States in support of or opposition to legislation."³⁶ And in *United States v. Slaughter*,³⁷ the district court held that the Act was not applicable to persons who helped to prepare witnesses for appearances before congressional committees, either in gathering material, preparing a statement for the witness, or in any other way.

The only state law that I am aware of that specifically refers to church lobbyists is a California statute which exempts from registration "a person when representing a bona fide church solely for the purpose of protecting the public right to practice the doctrines of such church."³⁸

In general, my view on state registration is when in doubt, register. As a former prosecutor I can assure you that it is highly unlikely that anyone would bring a prosecution against an unregistered church lobbyist. On the other hand, in the wake of Watergate a lot of distasteful publicity might result were someone to claim that a lobbyist for the Church was unregistered. As the *Women's Lobby* case shows, there are people around who will make such claims.

³⁶ 2 U.S.C. § 267(a) (1970).

³⁷ 89 F. Supp. 205 (D.D.C. 1950).

³⁸ See CAL. GOV'T CODE, § 9906(b) (West 1966).