No Taxation Without Representation

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PART 1

In the fall of 1947 I entered sixth grade at the public junior high school in Baker, Oregon, a town of 9,900 people in the northeastern comer of that beautiful state. In an unprecedented move, I ran for student body secretary; no one from the sixth grade had ever before run for a school-wide office. As an underdog, I searched for a campaign slogan that would stir the electorate to break tradition.

As I was preparing my first and only speech for the campaign, my campaign manager - my mother - came up with just the right words for our revolutionary cause: "AND I BELIEVE IN NO TAXATION WITHOUT REPRESENTATION!" With this ringing declaration, I captured not only the vote of my fellow sixth graders but that of the senior eighth graders, and buried my seventh grade opponent in an historic landslide victory.

No Prerogative Taxing Power

As a school child I knew very little about what came out of my mouth in that school assembly. Oh, I had learned enough American history to know that it had been the battle cry of those who staged the Boston Tea Party. But it was not until my college years that I learned the principle for which the slogan stood: That no civil ruler has prerogative power to tax the people; but only to tax by the consent of the people through their elected representatives.

It was much later, as a teacher of constitutional law and policy that I learned the foundation for this historic principle, first articulated in Anglo-American history in the Magna Charta. Property rights are not given to the people by the civil ruler, but by God; civil societies are formed by the people not to create property rights, but to preserve them; therefore, civil rulers are only authorized by the people to sanction those who violate the people's natural rights to the possession and enjoyment of their property.

Clinton's New Covenant

With the election of Bill Clinton this time-honored foundational principle has been placed at risk. As Harvard sociologist, Orlando Patterson, wrote in the November 13, 1993 issue of *The New York Times,* Clinton has discarded "natural rights" in his "New Covenant" in exchange for the modem view that all rights are "socially constructed, not inherent."

If the people's property rights are mere social constructs, then the people's rulers have no obligation to respect them. Under this view, civil authorities possess *prerogative power* to impose whatever responsibilities and burdens deemed expedient for the good of society.

President Clinton drew on this political philosophy when, in his August 3, 1993 address to the nation, he pronounced in support of the tax increases in his budget deficit package: "The second principle of this plan is fairness, those who have the most contribute the most." After all, if civil society creates economic opportunities and, with those opportunities the wealth that comes from them, as Clinton believes, then those who benefit the most ought to shoulder the greatest responsibility, including the payment of the lion's share of the taxes.

The Original Covenant

But this philosophy is not enshrined in the United States Constitution. First, Article I, Section 7, Clause 1 dispels any claim that the Congress of the United States has prerogative power to tax the people. Second, the Constitution abounds with provisions designed to protect private property by limiting the power of Congress over it.

As for the claim of prerogative power to tax the people, it is rooted in history in the claim of a king to rule by divine right. This claim, in turn, rested upon the king's pretension to be God's regent to exercise the dominion authority granted to mankind under Genesis 1:26-28. John Locke and others ably refuted this assertion by demonstrating that the civil ruler did not derive his power by birth through his father Adam, but by the consent of the governed.

Locke's view was incorporated by America's founders into the nation's charter, the Declaration of Independence:

> *[T]hat all men are created equal, that they are endowed with certain inalienable rights.... That to secure these rights, governments are instituted among men, deriving their just powers from the consent of the governed ....*

Revenue Bills Shall Originate In The House

Article I, Section 7, Clause 1 of the United States Constitution was designed to give practical application of this principle by requiring all tax measures to originate m the House of Representatives.

The House was chosen for very specific reasons. Originally, House members were elected directly by the people, as contrasted with the Senate whose members were elected by the state legislatures. In addition, members of the House stood for election every two years, as contrasted to the 6-year terms of senators, and were more numerous, being apportioned according to population.

It was this second feature that led James Wilson, an early American constitutional authority and Supreme Court justice to write:

> *Our houses of representatives are more numerous than our senates: the members of the former are chosen more frequently.... For these reasons... information more local and minute may be expected ... (and such) information will be of service in suggesting and collecting materials for the laws of revenue.*

Even after the passage of the 17th Amendment providing for the popular election of senators, Wilson's justification for the constitutional requirement that revenue bills originate in the House remains true.

After the enactment of a bill raising taxes, all members of the House of Representatives must stand for election within a period of 2 years or less, whereas, two-thirds of the members of the Senate are insulated by a period of 4 to 6 years before they must stand for election.

Representatives come from smaller districts where ordinary people have greater and more frequent access, whereas senators still represent state-wide constituencies.

The 1993 Taxes Did Not Originate as a Revenue Bill

None of the tax increases in the August 1993 deficit reduction package were passed according to the specific process ordained by the Constitution for the enactment of "Revenue Bills." While the entire package did originate in the House, it did not originate as a "bill for raising revenue" within the meaning of Article I, Section 7, Clause 1.

The first purpose of this clause is to require that revenue raising measures be so designated in order that the specific legislative process required, origination in the House with all of its safeguards, be implemented.

The 1993 tax increases are contained in a bill that is officially named the Omnibus Budget Reconciliation Act of 1993. An omnibus bill it is; a revenue bill, it is not.

"The omnibus" carries no less than eighteen "paying passengers," twelve of whom are identified in each of the first twelve Titles. Three of these twelve titles are designated as separate Acts; each of the twelve deals with a different subject and each deals with government spending, not revenue raising.

The revenue raising provisions, however, are not separately treated. They are included in Title XIII along with provisions related to a variety of government spending programs, including health care, human resources, income security, customs, trade, food stamps, and timber sales. The entire Title XIII occupies 275 pages of the 388-page Act, with the revenue portion alone filling 160 pages or almost 40% of the entire Act.

The revenue chapter of Title XIII is entitled the "Revenue Reconciliation Act of 1993." Given its size, one wonders why the people's representatives did not give it a separate title of its own, much less give it the separate treatment that the Constitution provides for tax bills. Could it be that they knew very well that they were bypassing the process dictated by Article I, Section 7, Clause 1.

By sandwiching the tax measure into one Title along with the other subjects the tax increase was buried in a pile of promises of spending reductions. This is taxation *by misrepresentation,* which is no different in principle to taxation without representation.

The Gasoline Tax Did Not Originate In The House

To illustrate this point one need only consider how the gasoline tax got "onto this omnibus." A cursory reading of the Conference Report explaining the terms of the new Act reveals very quickly that a passenger named the "Transportation fuels tax increase" did not get on at the Act's first stop at the House.

On page 661 of the report the Committee has informed the reader that there was "no provision" for such a tax in the House bill, but that the gasoline tax was placed by the Senate via an amendment

to the overall deficit reduction package.

While the Senate does have authority to amend bills raising revenue, it must not exercise that power in derogation of the purpose of the constitutional requirement that such measures originate in the House.

This point is best illumined by examining the constitutional role of the Senate under Article I, Section 7, Clause 1. Joseph Story in his *Commentaries on the Constitution* stated the purpose, as follows:

> *[T]here seems a peculiar fitness in giving the Senate a power to ... amend ... money bills. The due influence of all the States is thus preserved, for otherwise it might happen, from the overwhelming representation of some of the large States, that taxes might be levied which would bear with peculiar severity upon the interests, either agricultural, commercial, or manufacturing, of others, being the minor states, and thus the equilibrium intended by the Constitution ... might be practically subverted.*

This purpose was served in the 1993 Omnibus Act in the case of the House-originated "Federal energy tax." That tax was eliminated by the Senate, primarily because of the stiff opposition to it from the Democratic senators representing the oil-rich states of Oklahoma and Louisiana. But what of the Senate-originated gasoline tax increase?

Unlike all of the other tax increases in the 1993 Act, the gasoline tax is the only one that falls directly upon the people. As President Clinton put it: "The plan asks an average working family to pay no more than $3 a month in new taxes with a 4.3 cent a gallon increase in the gas tax. This is the only new tax working people will pay."

Yet this is the only tax that did not originate in the House. Acceptance by the Conference Committee is no substitute for House origination, because the Committee is dominated by a few powerful House and Senate Committee chairmen who are insulated from any significant risk of defeat at the polls.

So while the Senate role was preserved to save the oil-rich states from a discriminatory tax on energy, the House role was not. The ordinary person had no opportunity to make his views known to his representative who, according to Justice Story:

> *more directly represents the opinions, feelings, and wishes of the people; and, being directly dependent upon them for support, ... will be more watchful and cautious in the imposition of taxes than ... (his counterpart in the Senate) ....*

This point is especially telling in the case of the Omnibus Budget Reconciliation Act of 1993 which squeaked through the House by the narrowest of margins. Had Congress followed the constitutional procedure required for passage of Revenue Bills, the outcome would surely have been different.

> *Will not the people choose men of integrity and in similar circumstances with themselves, to represent them? What laws can they make that will not operate on themselves and their*

> *friends, as well as on the rest of the people? Will the people reelect the same men to repeat oppressive legislation? Will the people commit suicide against themselves, and discard all those maxims and principles of interest and self-preservation which actuate mankind in all their transactions?* Edmund Randolph (1788).

PART 2

In Part 1 of this 2-part series we established the constitutional principle that taxes may be imposed only with the consent of the people through their elected representatives, not as a prerogative right of the civil ruler. In addition, we demonstrated that the U.S. Constitution requires all "bills for raising revenue" to originate in the House of Representatives in order to insure that taxes will, in fact, only be levied with the consent of the people.

Having established this principle and uncovered this constitutional requirement, we claimed that the tax increases contained in the recently enacted Omnibus Budget Reconciliation Act 1993 were not enacted according to the required constitutional processes of Article I, Section 7, Clause 1.

The principle of no taxation without representation is not, however, confined to Article I, Section 7, Clause 1. As important as the House origination process is, it protects the people only if Congress proposes a bona fide tax. The question is what is a tax?

Tax vs. Taking

In 1830 Chief Justice John Marshall defined the power of taxation to be one to be exercised "on all the persons and property belonging to the body politic." *Providence Bank v. Billings,* 29 U.S. (4 Pet.) 514, 563 (1830). In contrast to this power to levy on all persons or property generally, is the power of eminent domain where "[t]he public seize and appropriate ... (a person's) particular estate, because of a special need for it ...." II T. Cooley, *Constitutional Limitations* 1201 (8th Ed. 1927).

Because a tax by its nature is a levy on persons or property generally, the requirement that the people be taxed only by the vote of their representatives was considered by America's founders to offer sufficient protection from the misuse of the taxing power. See *McCulloch v. Maryland,* 17 U.S. (4 Wheat.) 316, 428 (1819).

But a levy on one person or on a particular person's property posed a far different problem of abuse calling for a very different solution.

The Fifth Amendment of the United States Constitution prohibits Congress from taking anyone's private property without just compensation. A classic example of a taking is the condemnation of a person's real property for the purpose of erecting a government building upon it. In order for the government to take such action, it must compensate the owner of the land at fair market value.

Without the compensation requirement no person's property would be safe from government action to take it for public use. Because such action affects only one person, the person's property would not be protected by the process requiring the consent of the people's representatives generally. So America's founders added the takings clause to insure against actions favoring the many at the

expense of the few.

The 1993 Income, Gift, and Estate Tax Increases Are Takings

The income, gift, and estate tax increases in the Omnibus Budget Reconciliation Act of 1993 were not across-the-board. Instead, the income tax increase was limited to incomes in the highest of three income brackets. Likewise, the gift and estate tax increases were limited to wealth transfers at the top.

With respect to the tax increases contained in the Omnibus Act, the Conference Committee unapologetically reported that "the tax increases affect only higher-income individuals and corporations ... (Emphasis original.) While the Committee acknowledged one exception, the gasoline tax, it promised that this increase ... will cost the average household less than one dollar a week." This fact enabled the Committee to brag "that 81 percent of ... the tax increase will fall on households with incomes over $200,000. Furthermore, 76% of the net tax increase will be on the wealthiest 1% of the population ..."

In so reporting the Committee simply echoed the remarks made by President Clinton in his message to the nation urging passage of the Act: "We've worked hard ... to insure the lowest possible tax on the middle class. The plan asks an average working family to pay... less than a dime a day.... This is the only new tax working people will pay."

By limiting the new "tax burden" in such a way as to virtually immunize 99% of the population from its impact, it is easy to see through the "verbal cellophane" of the tax language of the statute and discover that the increased burdens placed upon the wealthy 1 percent is a "taking" not a tax.

In a recent case Justice Antonin Scalia, joined by Justice Sandra Day O'Connor, wrote in opposition to a similar scheme, a rent control law requiring landlords under "hardship" circumstances to lower their rents for tenants on welfare:

> *[T]he 'hardship' provision is invoked to meet a ... [distinct] social problem: the existence of some renters who are too poor to afford even reasonably priced housing. But that problem is no more caused by ... landlords than ... by ... grocers... or department stores ... or employers .... The traditional manner in which the American government has met the problem of those who cannot pay reasonable prices for privately sold necessities... has been the distribution to such persons of funds raised from the public at large through taxes.... Unless we are to abandon the guiding principle of the Takings Clause that "public burdens ... should be borne by the public as a whole," this is the only manner that our Constitution permits....* *Pennell v. San Jose,* 485 U.S. 1, 21-22 (1988) (dissenting opinion).

By placing 76% of the economic burden on 1% of the people to rescue the government welfare programs for the whole society, Congress has abandoned this central purpose of the Takings clause in its deficit reduction package. It has, in effect, exercised its taxing power in such a way as to deprive 1% of the population of significant wealth without placing a comparable burden on the people as a whole. This is taxation without representation and prohibited by the Fifth Amendment

Takings Clause.

The Retroactive Tax Increases Are Unconstitutional Penalties

Part of the reason that 7% of the tax burden falls upon only 1% of the population is that the income tax and the estate and gift tax increases are made retroactive to January 1, 1993, over eight months prior to the passage of the Act. For what reason are these tax increases retroactive when the gasoline tax, for instance, was not imposed until October 1, 1993, two months after the effective date of the Act?

The Conference Committee would have the American people believe that its sole purpose in increasing the income, gift and estate tax rates was to "restore fairness to our tax system" by improving "the progressivity of the tax structure." But the report contains no data supporting a change only in the top tax rates, much less the specific percentage of increases at the top, as necessary to restore "fairness." The reason? Because "fairness" in the tax structure was not Congress' real purpose.

If fairness were the real purpose there would have been no need for the retroactive feature. Tax structure "fairness" could have been achieved with an effective date following enactment, thereby giving affected taxpayers time within which to accommodate the increased tax burden.

But the real purpose was, as the Conference Committee report itself admits, to "require ... those who benefitted from the policies of the 1980's and the early 1990's to pay their share of the bill that has come due." (Emphasis added.) That purpose could only be realized by making the tax increase retroactive be- cause the only data concerning "fairness" marshalled by the Conference Committee related to the past.

According to the Committee report, Congress had data proving that the lower tax rates on the wealthy in the 1980's and early 1990's was one of three factors that caused "[t]he income and living standards of the American worker [to] stagnate .... our international trade balance [to] deteriorate.... [and] the distribution of income and wealth ... (to become) much more unequal."

Can Congress on the basis of these findings choose to enact into law a "tax burden" applying retroactively to 1 percent of the population? The answer is no. Such a law constitutes a penalty, not a tax. As a penalty it is an unconstitutional bill of attainder.

A bill of attainder is a statute that isolates an individual or a small, easily identifiable, and already closed class of persons for deprivation of life or property based upon past conduct without affording that person or persons an opportunity to be heard in a court of law to answer the charges brought against them. *United States v. Lovett,* 328 U.S. 303, 315 (1946).

Such a statute is prohibited by Article I, Section 9, Clause 3. As Harvard Law Professor Laurence Tribe has so ably stated:

> *The essence of the bill of attainder ban is that it proscribes legislative punishment of specified persons - not of whichever persons might be judicially determined to fit within*

> *properly general proscriptions duly enacted in advance...* L. Tribe, *American Constitutional Law* 643 (2d. Ed. 1988).

By isolating 1% of the population and imposing increased income, gift and estate taxes upon such a small group based upon action already taken by many of its members, especially those who have already died, may vindicate the Democrat-controlled Congress sense of frustration with the Reagan/Bush tax policies, but such action cannot be taken without violating the constitution's ban on bills of attainder.

CONCLUSION

President Clinton and the Democrat-controlled Congress managed to increase taxes in 1993 only by disregarding the Constitutional principle of no taxation without representation. By hiding the revenue raising measures in an overall deficit reduction package, they bypassed the constitutionally mandated procedure for taxing the people. By limiting the tax increases so that 76% of them apply to only 1% of the people, they bypassed the constitutionally mandated protection of private property.

It is once again time for the American taxpayer to take action. As the Stamp Act of 1765 was enacted by an English Parliament in disregard of the Magna Charta's guarantee of no taxation without representation, so the Omnibus Budget Reconciliation Act of 1993 was enacted by an American Congress in disregard of the 1789 Constitution's guarantee of that same principle.

APPENDIX

Each individual of the society has a right to be protected by it in the enjoyment of his life, liberty, and property, according to standing laws. He is obliged, consequently, to contribute his share to the expense of this protection,· to give his personal service, or an equivalent, if necessary: but no part of the property of any individual can, with justice, be taken from him, or applied to public uses, without his own consent, or that of the representative body of the people ... (T)he people of this commonwealth are not controllable by any other laws than those to which their constitutional representative body have given their consent. And whenever the public exigencies require that the property of any individual should be appropriated to public uses, he shall receive reasonable compensation therefor.
Article X, Constitution of Massachusetts, 1780

In countries where liberty is most esteemed, there are laws by which a single person is deprived of it, in order to preserve the whole community. Such are in England what they call Bills of Attainder.... These are in relation ... to those laws which were made in Rome against private citizens.... These were never passed except in great meetings of the people. But in what manner soever they were enacted, Cicero was for having them abolished, because the force of a law consists in its being made for the whole community....
Montesquieu, The Spirit of the Laws, Bk.12, C. 19. (1748)

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