



Liberty Tree

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By Dick Greb

What's in a WORD?

In the course of being questioned about his affair with intern Monica Lewinsky, then-President Bill Clinton famously stated, “It depends upon what the meaning of the word *is* is.”¹ Quite naturally, this creative parsing of language was seen by many as just one more deception in a long line of them. And yet, as anyone who studies the law knows, the definitions of words used in statutes play an extremely important part in determining such laws’ applicability and effect. A major issue in construing law, then, as pointed out by Clinton, is indeed determining what the meanings of words are.²

Anybody who studies the law will at some point come across “legal terms” in the statutes. There’s nothing inherently deceptive or sinister in using them — “legal term” is just shorthand for a term specifically defined in the law, by the legislature. So, whenever you see a word or phrase defined in the statutes, you should apply such definition to the term wherever it’s used. However, you need to be aware that legal terms are sometimes explicitly limited in their applications to certain portions of the code. For example, “For purposes of Section *x*, the term *y* means...” limits the definition of the legal term *y* to Section *x* only. Any other section where the term ap-



pears, that definition would not apply. This can create a conundrum of sorts, because it could result in the exact same word or phrase being a *legal term* in one portion of the law, but a mere *common* term — that is, a term undefined in the law — in the rest. Of course, you should also be aware that different definitions might apply to the same *legal term* in different portions of the law.

Secretary or his delegate?

Section 7701 of Title 26 contains definitions applicable to the whole Internal Revenue Code. Paragraph (a)(11) gives the definitions of two legal terms that give a clear example of how they work:

(11) Secretary of the Treasury and Secretary.

(A) Secretary of the Treasury. The term “Secretary of the Treasury” means the Secretary of the Treasury, personally, and shall not include any delegate of his. (B) Secretary. The term “Secretary” means the Secretary of the Treasury or his delegate.

Thus, when Congress wants to allow the delegation of any function it assigns to the Secretary of the Treasury, it uses the term “Secretary,” and if delegation is not allowed, Congress uses the term “Secretary of the Treasury.” In this way, a legal term consisting of a single word — a term used many hundreds of times in the Code — replaces the longer phrase. (And since the Code is excessively long already, every little bit helps.) In §4262(e)(1), we can see both terms in use: “If the Secretary of the Treasury determines that Canada or Mexico has entered into a qualified agreement, the Secretary shall publish a notice of such determination in the Federal Register.” So, while the Secretary himself must make the referenced determination, he may delegate the publishing of it to a subordinate.³

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1. See page 130 (lines 5-8) of *Volume III: Document Supplement, Part A - William J. Clinton Statements*, found at <https://tinyurl.com/y54pkp64>.
2. The point Clinton was making was whether “is” was used in the present tense, or if it was used to signify present and past tense. “[I]f is means *is*, and *never has been*, that is not — that is one thing. If it means, there *is* none, that was a completely true statement.”
3. Searching the Code for the term “Secretary of the Treasury” I found that it is often followed by “or his delegate.” In these situations, the full name is used to distinguish it from other Secretaries (Labor, Commerce, State, etc.) referred to in the same paragraphs.

Includes and including

There is another pair of legal terms in the tax code that play an important part in determining the extent of the laws — “includes” and “including.” The importance of these terms is magnified because they are used in the definitions of many other legal terms. Therefore, a proper understanding of them is crucial to a proper understanding of the tax law as a whole.⁴ Unfortunately, there seems to be a serious lack of that in the tax movement.

The meaning of the term “includes” within the movement is one of those areas where an idea takes hold and becomes entrenched in people’s minds without enough investigation into its correctness. And like the misunderstanding of apportionment of direct taxes,⁵ it affects the mindset of patriots, leading them down the wrong paths. When the idea is compelling enough, and confirms what we already want to believe, then rigorous research is too often left by the wayside.

So, what is this compelling idea? It’s that “includes” in the tax code is used in a *restrictive* sense, rather than an *expansive* sense. The difference between the two is significant. In the expansive sense, items which are “included” are *added to other unlisted items*, while in the restrictive sense, items which are “included” comprise the *entirety of the list*. As you can see, the only overlap is the listed items, so there can be no question as to whether they belong. The question is whether any unlisted items belong in the definition.

Montello Salt Company

If you ask just about any patriot where the idea comes from that “includes” is restrictive, they would likely refer to the Supreme Court decision in the *Montello Salt Company v. Utah* case from 1911.⁶ The Montello Salt Company was a corporation formed by citizens who discovered vast deposits of

salt beneath land that they owned. The case arose because Utah was trying to steal that valuable land from its citizens, justifying it by reference to an already fulfilled grant of land to the state by the federal government.

That lands to the extent of two townships in quantity, authorized by the third section of the act of February twenty-one, eighteen hundred and fifty-five (10 Stat. at L. 61, chap. 117), to be reserved for the establishment of the University of Utah, are hereby granted to the state of Utah for university purposes, to be held and used in accordance with the provisions of this section; and any portions of said lands that may not have

in·clude', *v.t.*; included, *pt., pp.*; including, *ppr.* [M.E. *includen*; L. *includere*, to shut in, include; *in, in, and claudere*, to shut, close.]
1. to enclose; to shut up or in.
2. to have as part of a whole; to contain; comprise.
3. to take into account; to consider as part of a whole; to put in a total, category, etc.; as, I *include* the five dollars you owe me.
Syn.—comprise, comprehend, embrace, in-close.

Definition of “include” as given by *Webster’s New Twentieth Century Dictionary*, 2nd Ed. (1978). On the first page of this issue, a word cloud (a.k.a. tag cloud) derived from this definition is depicted.

been selected by said territory may be selected by said state. That in addition to the above, one hundred and ten thousand acres of land, to be selected and located as provided in the foregoing section of this act, **and including all saline lands in said state**, are hereby granted to said state, for the use of said university, and

two hundred thousand acres for the use of an agricultural college therein. That the proceeds of the sale of said lands, or any portion thereof, shall constitute permanent funds, to be safely invested and held by said state, and the income therefrom to be used exclusively for the purposes of such university and agricultural college, respectively.⁷

Utah argued that the emphasized phrase gave them ownership of all salt lands, trying to support their attempt to take the land away from its rightful owner because salt had been found thereon. The Supreme Court held:

However, let us consider the words of § 8. The determining word is, of course the word ‘including.’ It may have the sense of addition, as we have seen, and of ‘also;’ but, we have also seen, ‘may merely specify particularly that which belongs to the genus. It is the participle of the word ‘include,’ which means, according to the definition of the Century Dictionary, (1) ‘to confine within something; hold as in an inclosure; inclose; contain.’ (2) ‘To comprise as a part, or as something incident or pertinent; comprehend; take in; as the greater includes the less; ... the Roman Empire included many nations.’ ‘Including,’ being a participle, is in the nature of an adjective and is a modifier. What, then,

4. Since, as we will see, these two terms are defined together, whenever I use either “includes” or “including” hereafter, it will refer to both terms.
5. I encourage everyone to go back and reread “Apportionment” in the August 2011 *Liberty Tree*.
6. *Montello Salt Company v. State of Utah*, 221 U.S. 452 (1911).
7. *Ibid.*, at 458. Emphases added and internal citations omitted throughout.

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does it modify as used in § 8? Necessarily, we think, the preceding substantive phrase ‘one hundred and ten thousand acres of land,’ and ***we have the meaning of the section to be that the saline lands are to be contained in or comprise a part of the 110,000 acres of land.*** We see no particular awkwardness in the expression of the purpose, and it well may be contended that it needs not for its support the rule of strict construction. And such purpose is in harmony with grants of saline lands to other states. It is also sustained by the reports of the committees of the House and Senate.⁸

Notice that the Court said the saline lands ***comprise a part of*** the 110,000 acres. Said lands do not constitute a separate or additional grant, but Utah was free to choose from all saline lands for its 110,000 acres. However, also notice that the Court does say here that the ‘including’ phrase modifies the phrase ‘110,000 acres of land’, but in construing it the way they do, it really modifies the phrase ‘to be selected and located as provided in the foregoing section of this act.’ That is, the inclusion of the saline lands is for the purpose of selecting and locating the 110,000 acres (and also, of necessity, the additional 200,000 acres). In fact, the court points out that without that phrase, the saline lands would have been unavailable for selection:

The supreme court of the state also gave special significance to the use of ‘and,’ as adding something to that which preceded. *The court also considered that the word ‘including’ was used as a word of enlargement, the learned court being of opinion that such was its ordinary sense. With this we cannot concur. It is its exceptional sense, as the dictionaries and cases indicate. We may concede to ‘and’ the additive power attributed to it. It gives in connection with ‘including’ a quality to the grant of 110,000 acres which it would not have had — the quality of selection from the saline lands of the state. And that such quality would not exist unless expressly conferred we do not understand is controverted. Indeed, it cannot be controverted. Under the applicable statutes and uniform policy of the govern-*

*ment, saline lands would not have been subject to selection in satisfaction of the 110,000-acre grant, in the absence of a special provision authorizing their selection.*⁹

We see here that the court is somewhat schizophrenic in its decision. First it says that “includes” is not used as a word of enlargement, but the result of its construction of the law is that it does indeed enlarge the pool of available land from which Utah may select its grant. So, the word actually is used as a term of enlargement, just not as an enlargement of the grant itself, as the state claimed. Thus, the only saline lands that the

state has any claim upon are those it chose as part of the 310,000 acre grant.

Thus, the *Montello* decision doesn’t offer any real support to the idea that “includes” is a word of restriction, other than the court’s comment above that its use as a term of enlargement was its “exceptional sense” rather than its “ordinary sense.” And in fact, if “including” was construed in the *Montello* case in the restrictive sense that patriots typically ascribe to it — *i.e.*, that *included* items comprise the *entirety of the list* — the end result would have been significantly different. Utah would have been restricted to choosing its grant of land *only* from the saline lands, and would not have the option of choosing from all the other land described. If not enough saline lands existed to fulfill the grant, then Utah would be out of luck, because it could choose from nothing else.

Words and Phrases

If you visit a law library, you will find a set of volumes entitled *Words and Phrases*. These books contain citations of case decisions which interpret various terms used in the laws. On one of my visits, I made copies of all fourteen pages dealing with the term “include.” All together, there are 118 listings under the main heading “include,” divided between nine subheadings: **In general** (38 listings); **Addition to and also** (12); **Comprise synonymous** (11); **Consisting of distinguished** (2); **Embrace synonymous** (4); **Offense** (1); **Part of** (6); **Word of enlargement** (27); and **Word of limitation** (17). The construction of the term given by the Supremes in *Montello* (under the heading **Addition to and also**),¹⁰ as well as that given by the state

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8. *Ibid.*, at 464.

9. *Ibid.*, at 466.

10. For some reason, the exact same quote is listed twice under that heading.

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court (under the heading **In general**) are both included in the list.

Many of the listings under this heading are from state court decisions, and of those from the federal courts, very few relate to tax laws. One listing in particular seems to address the exact issue we're discussing:

The statutory definition of a thing as "including" certain things does not necessarily place thereon a meaning limited to the inclusions. *People v. Western Air Lines*, 268 P.2d 723, 733, 42 C.2d 621.

However, there's nothing that indicates the context of the quote, and since it's just a state court decision, there's no reason to believe it's construing the use of the term in the tax code. The bottom line is that even though the number of items is larger for the expansive view of "include," there are still enough on the other side to mitigate any definitive conclusion on the proper construction of the term for Title 26. But the flip side of that coin is that this set of volumes clearly demonstrates that the restrictive view is by no means a foregone conclusion.

Back to §7701

So, while neither *Montello* nor *Words and Phrases* provide any real support for the restrictive view, that doesn't mean we have nowhere to turn for guidance. Title 26 itself actually shines some light on the issue. Going back to §7701 — the definitions section of the code — we find under subsection (c):

Includes and including. The terms "includes" and "including" when used in a definition contained in this title *shall not be deemed to exclude other things otherwise within the meaning of the term defined.*

Wow! That's a pretty clear statement of the expansive construction of "includes" and "including." Including some items in the definition of a term doesn't exclude items not listed. You would think that would be the end of the investigation. But you'd be wrong! Because the idea of a restrictive construction is so compelling that many patriots just refuse to let go of it.

There is virtually no sentence that can be written so precisely that someone with a mind to do so can't misconstrue it. And so it is with §7701(c). One of the arguments I've heard is that if a term could mean something other than what is *included*, that would make said term too vague, and therefore void. But that ignores the reality of the law. The vast majority of words used in the law are undefined, yet that doesn't make them vague. One of the rules of statutory construction is that words in the law are taken in their commonly understood sense, unless explicitly

defined otherwise. As mentioned earlier, an undefined term is a *common term*, and a defined term is a *legal term*.

The *legal term* "Secretary" discussed above uses the word "means" in its definition, and therefore supplants whatever definition may attach to the *common term* "secretary." But let's look at another definition, this time at §7701(a)(3):

Corporation. The term "corporation" *includes* associations, joint-stock companies, and insurance companies.

This term provides a good example of the results of applying the two different constructions on the word "includes." According to the restrictive view, since they are all that are listed, *only* associations, joint-stock companies and insurance companies would be corporations, and nothing else. But according to the expansive view (and §7701(c)), including those three types of business organizations in the definition wouldn't exclude any other business organizations which would fall within the meaning of the *common term* "corporation." And what could be more obviously within the common understanding of the term "corporation" than a corporation? It would be ridiculous to hold to the view that an actual corporation wouldn't come within the definition of the *legal term* "corporation" simply because three other forms of business organizations were "included" in it. Since the word "includes" is used in (a)(3) rather than "means," the definition of the common term is not *supplanted* by the definition of the legal term. Instead, the latter definition *supplements* the former.

This type of incongruity should always be a red flag to you, because it indicates an error somewhere. The trouble is that too many patriots don't bother following their ideas out to their inevitable results, and so miss out on the opportunity to improve their understanding. Or, if they do run across such an inconsistency, they brush it aside as unimportant, or rationalize it as being the intent of the legislators, albeit without any evidence to support the contention.

If the Tax Honesty movement is ever to progress, then it must be intellectually honest. And that means being willing to reconsider even long-held positions when confronted with opposing arguments or new information. We need to be able defend our positions and refute opposing ones — with evidence. If that isn't done, then we take the risk of leading others astray, which would obviously sour them on our movement, as well as possibly exposing them to harm from acting on false beliefs. And that is obviously not the way to further our cause.

