



Liberty Tree

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TO BE OR NOT TO BE ... *Constitutional* Part I

By Dick Greb

There's a funny thing about the tax honesty movement that nobody but me has seemed to notice. Virtually nobody — but me again, seemingly — believes that the tax laws are unconstitutional. Now, I find that a bit funny because it would seem the odds would favor a little stronger showing than that. But, in most of my years involved in the tax movement — and that's been quite a few (even before the moniker "tax honesty" was coined), I've met very few indeed that believe as I now do. I qualify it with 'now' because I, like most of them, once believed that the tax laws were constitutional. Unlike most of them, however, I came to believe otherwise some years ago. In the course of this series, I will be exploring the reasons I came to change my mind about it.

Before I get into that, though, it will be useful to consider the premises on which the belief in constitutionality is founded. First, and most importantly, the belief is based on the premise that the tax laws were, and continue to be, written so as to exclude citizens, whether completely or only to some degree. Unfortunately, the executive branch (for the most part represented by the I.R.S.) misapplies the law so as to collect it from them anyway. Indeed, those who believe in constitutionality of the tax laws (who I will call the "cons") believe them to be so **only because** they exclude the citizen. That is, if the citizen were taxed the way the government tries to convince the public that they are, then most cons would wholeheartedly believe the laws were unconstitutional.

Technical constitutionality

But, if Congress recognized that an income tax on the citizens was unconstitutional, then why is it written in such a way that most citizens believe it applies to them? I don't think it would be a stretch to say here that intentional deception on the part of Congress is the reason most often claimed. The cons believe that while Congress wrote the laws to be *technically* constitutional — by *excluding* citizens, they crafted them in such a way as to deceive said citizens into believing that they were required to pay them anyway. That is, Congress went to great lengths to conceal the fact that the tax was not meant to apply to citizens. So much so, that only a few are able to understand the technical subtlety of it. The end result of this chain of events is that Congress, in order to protect the constitutional rights of the citizenry not to be subject to an oppressive income tax, wrote the laws to exclude them, while at the same time, *defrauding* them by concealing that fact behind a veil of legalese mumbo-jumbo. In other words, they defrauded them in order to protect their rights. Of course, any Congress that would deceive the citizenry into paying a tax that they didn't really owe, would not think twice about enacting a law to make them owe it. And that's the rub.

What is the benefit of such an elaborate deception, if those you intend to deceive are so unaware that they don't realize the new tax being extracted from them is unconstitutional? It's much easier to forget the subtleties and just write the law to tax them in that case. Especially when it all ultimately falls in the lap of the Supreme Court. If the Supreme Court says the law is constitutional, then by golly, it most certainly is, and that's all there is to it. This, my friends, is the very heart of the beautiful simplicity of my own belief. So, let me repeat it. If the Supreme Court says the law is constitutional, then by golly, it most certainly is, and that's all there is to it. That's the only support Congress needs.

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What would the court do?

So the question comes down to whether Congress believes that the Supreme Court will back their play in extracting income taxes from citizens. If they believe it will, then all they need do is enact it plainly. But — and this is a rather big but — even if they don't believe that, then what benefit could ever come from technical constitutionality when the majority of people with standing to challenge the validity of the law would be those who were intentionally deceived into paying it? Can't you just imagine someone who's been paying the tax because the law *appeared* to obligate them to do so, finally getting his challenge to the payment of the unconstitutional tax in front of the highest court in the land, and the United States government says: "Nyah! Nyah! It's not unconstitutional because you didn't really owe it. We just made you think you did. Ha! Ha! Ha! Sucker!"

But all joking aside, when do you play that technical constitutionality trump card? If technicality is not going to be argued against the sucker specifically challenging the application of the tax to him (that is, if the deception is not to be revealed), then when do you use it? I mean, once you let the cat out of the bag, a literal flood of lawsuits would hit the courts. So, not only is it a one-shot deal (since once acknowledged, the game's over), but the resultant back-lash would likely negate any earlier benefits of the taxes collected by way of the deception, not to mention a flood of ill-will that would give Congress a good flushing out. Realistically then, the government has no choice but to take the position that the income tax against citizens is constitutional. And of course, that is their position, and it always has been. The truth is, there's no situation where technical constitutionality is beneficial to the government, and that makes it pretty useless, motivation-wise. But, in the end, it's useless because if the Supreme Court is willing to uphold the tax against a citizen challenging its constitutionality, when the only factor which makes it technically legitimate is never presented, nor decided, then it's completely unnecessary in the first place.

Why bother?

Don't forget that the effort involved solely in the deception is formidable. Just the crafting of the laws involves a lot of forethought. I mean, any piece of legislation as intricate as the Internal Revenue Code (although I recognize that it was written in many pieces) takes years of study and

drafting. But the whole idea of the deception requires not just *that* considerable forethought, it adds *another* layer of effort, figuring out a way to write it in a way which technically complies with the Constitution while deceiving the suckers. Yet, given the lack of payoff for technical constitutionality, why bother? If the judiciary is willing to back government's unconstitutional impositions, then no further deception is warranted, nor even useful. Ultimately, the continued existence of the income tax, and indeed, all of our current level of oppression rests in the hands of nine black-robed liberty thieves, who seem to like it just fine. In the end, it takes no more for tyranny to prosper than collusion between the legislative and the judicial branches of government. Certainly, the executive branch can't be relied upon to rein itself in from the use of extra-constitutional powers usurped by an obliging Congress.

The real point to all of this is that since the courts can be relied upon to stand behind the government's encroachments on God-given rights, there's no reason to go to the trouble of fabricating the lie. It's much simpler to just write the laws to obligate citizens, and rely on the courts to uphold their validity. No complicated conspiracy of petty executive branch bureaucrats needed. No secret language or codes. In fact, leaving even a hard-to-find loophole allowing anyone to be free would be counter-productive. Since technical constitutionality isn't necessary, the obvious incentive for Congress is to extend the reach of the tax to *everything*, with well-placed confidence that the judiciary — up to and including the Supreme Court — will put their stamps of approval all over it.

Just try, try again

This leads to the next point, which is that given this incentive to write the law so as to obligate everybody and everything, and the lack of any conceivable incentive to exclude its operation upon citizens, knowing as they must that the Supremes would be behind them, there is absolutely no reason to believe that Congress did, in fact, exclude them. And as a testament to Congress' confidence in the Supremes, we can look to President Taft's address of June 16, 1909:

[I]t is now proposed to make up the deficit by the imposition of a general income tax, in form and substance of almost exactly the same character as, that which in the case of *Pollock v. Farmer's Loan and Trust Company*

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was held by the Supreme Court to be a direct tax, and therefore not within the power of the Federal Government to impose unless apportioned among the several States according to population.

... The decision of the Supreme Court in the income-tax cases deprived the National Government of a power which, by reason of previous decisions of the court, it was generally supposed that government had. It is undoubtedly a power the National Government ought to have. It might be indispensable to the Nation's life in great crises....

I therefore recommend to the Congress that both Houses, by a two-thirds vote, shall propose an amendment to the Constitution conferring the power to levy an income tax upon the National Government without apportionment among the States in proportion to population.

*This course is much to be preferred to the one proposed of reenacting a law once judicially declared to be unconstitutional. For the Congress to assume that the court will reverse itself, and to enact legislation on such an assumption, will not strengthen popular confidence in the stability of judicial construction of the Constitution. It is much wiser policy to accept the decision and remedy the defect by amendment in due and regular course.*¹

Taft's speech was occasioned by the Senate's proposal to enact another income tax no different than the one found unconstitutional 15 years earlier, figuring that the court would reverse itself this time around. Now, it should be noted that at this point in time, two of the four dissenting *Pollock* justices — that is, those who wanted to uphold the tax — were gone, and Taft had not yet

had the opportunity to elevate White to Chief Justice, nor to appoint half of the remaining justices. And yet, for some reason, the Senate believed the court would back them up this time. Notice too that Taft didn't deny that was a possibility, but merely felt that the end result would be a weakening of public confidence in the proclamations of the judicial branch. And so, he advocated for continuing with the amendment process before attempting another run at an income tax.

News flash: Congress doesn't agree

We also need to consider this issue from the opposite perspective. As I've shown above, even if Congress agreed with the *cons'* position that a tax on the income of citizens was unconstitutional, there is still no incentive for them to exclude them from the tax by means of technical constitutionality. They could derive absolutely no benefit from doing so. But the fact of the matter is that Congress *doesn't* agree with the *cons'* position! They never have. Congress has always considered it constitutional to tax the income of citizens — as well as the income of resident aliens, and any income of non-resident aliens that can be tied to the United States.

The above quote from Taft shows that Congress not only believed that the Supremes would reverse their condemnation of the income tax as being direct — and therefore, unconstitutional without apportionment — from the *Pollock* case, but also that Congress treated such tax as indirect. Indeed, *every income tax ever enacted was imposed as an indirect tax*, despite the fact that the income tax is by its very nature a direct tax. Since I addressed this issue at length in my series on the *Pollock* cases,² I won't elaborate on it further here. But, the bottom line is that the purported rationale for excluding citizens doesn't even exist in reality.

To show that Congress believed citizens were fair game, we will look at some passages from debates in the House of Representatives. The subject of the debate was H.R. 21214, a bill introduced on March 2, 1912, and a precursor to the income tax ultimately enacted in 1913. I found an interesting summary of the history of this bill embedded in a law review article written by a couple lawyers examining the legislative history of the definitions for business expenses, losses and bad debts:

After the Supreme Court held income taxes to be unconstitutional in *Pollock v. Farmers'*

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1. Congressional Record – Senate, June 16, 1909, page 3344. Emphases added and internal citations omitted throughout.

2. See <https://tinyurl.com/ykexnf3z>.

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Loan & Trust Co., a coalition of insurgent Republicans and Democrats succeeded in passing a law taxing corporate income in 1909. To avoid the provisions which had caused the Supreme Court to strike down the 1894 Income Tax Act, the Corporate Tax Act was worded as an excise tax on the right to carry on business, measured in amount by the net income of the corporation. In upholding the constitutionality of this tax in *Flint v. Stone Tracy Co.*, the Supreme Court gave the statute a broad application by defining “business” broadly as “that which occupies the time, attention and labor of men for the purpose of a livelihood and profit ... everything about which a person can be employed.”

Encouraged by the broad construction of the 1909 Act and pessimistic over the fate of the pending Income Tax Amendment to the Constitution, *the same coalition attempted in 1912 to extend the “excise tax” to individuals and partnerships* as well. ... The congressional debates show that “business” was intended here to have the broad application of the Flint definition, and was to cover even profits derived from the ownership of property or from lending money to individuals or corporations. *The tax was designed to reach all but the “idle holder of idle wealth.”*

... The “individual excise tax” bill of 1912 had been passed by both the House and the Senate, and had been referred to a Conference Committee when the Sixteenth Amendment was enacted. With constitutional obstacles thus removed, Congress abandoned the idea of an excise on profit-seeking *activities* in favor of a general tax on *net*

income.

The structure of the 1912 bill, coupled with the 1909 corporate tax law, provided the foundation for the Income Tax Act of 1913. The new act’s only substantial change shifted the tax from a levy on “doing business measured by net income” to a tax on the net income itself.³

The debates on this bill highlight a major point of contention between the Republican and Democrat parties at the time. The Democrats, who sponsored the bill, opposed high protective tariffs — which Republicans generally endorsed, and so wanted to ‘equalize the tax burden’ by lowering tariff rates and taxing individuals for engaging in ‘business.’ This rift was instrumental in the breaking away of the ‘progressive’ faction of the Republican Party, thus clearing the way for the election of Democrat Woodrow Wilson in 1912.

H.R 21214 was approved on March 19, 1912 by a vote of 253 to 40, with 103 not voting. In the next installment, we’ll look at the views of some key players in the House to see whether they support the position that Congress believed that taxing the income of citizens would be unconstitutional. In the meantime, I have posted copies of the debates from both March 16 and March 19, 1912 to the Liberty Works Radio Network website so you can also read them for yourself.⁴ An interesting side issue you’ll find there is a discussion of the pending ratification of the 16th Amendment, and the anomalies of which Congress was already aware.



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3. “Toward a more systematic drafting and interpreting of the Internal Revenue Code: Expenses, losses and bad debts,” by Layman E. Allen and Gabriel Orechhoff, *The University of Chicago Law Review*, Volume 25, No.1, Autumn 1957, pp. 22-34. Emphases added.

4. See <https://tinyurl.com/bdd2xmdu>.