

ALASKA LEGISLATURE SPECIAL COMMITTEE/SUBJECT FILES 8672

2363 SCOMM 99 • HOUSE SPEC. WORLD TRADE... RELATIONS, 1995-1996 658

STATE OF ALASKA

KEITH H. MILLER, GOVERNOR

DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL

POUCH K, STATE CAPITOL — JUNEAU 99801

1969 Opinions of the
Attorney General No. 6

September 5, 1969

The Honorable Wayne N. Aspinall, Chairman
Committee on Interior and Insular Affairs
House of Representatives
Washington, D. C. 20510

Dear Mr. Aspinall:

This opinion is in response to the request of the Committee during the recent hearings on Alaska Native Land claims for a legal memorandum of the Department of Law of the State of Alaska on certain issues which were raised by the Position Paper of the Alaska Federation of Natives ("A.F.N.").

The A.F.N. proposed "an overriding gross royalty of 2% of all proceeds from any state and federal lands. . . ." See A.F.N. Position Paper, p. 10.

Governor Miller stated during his testimony that "the 2 per cent proposal conflicts with the Statehood Act and the province of the Alaska State Legislature. . . ." The purpose of this memorandum is to explain the legal basis of the statement of Governor Miller.

The questions to be answered in this memorandum are several. First, does the 2% overriding gross royalty provision conflict with the provisions of the Alaska Statehood Act? Second, if there is such a conflict, would incorporation of such a royalty provision into a settlement enacted into law by Congress conflict with the United States Constitution?

The overriding gross royalty of 2% will be looked at both from the perspective of 2% of the current 12 1/2% ~~of oil royalty and as 2% on top of the current 12 1/2%.~~ The A.F.N. has stated that the memorandum should be presented in that light.

3-5-
A22

The Honorable Wayne N. Aspinall
Washington, D. C.

September 5, 1969
- 2 -

I. STATUTORY CITATIONS

The citations to pertinent provisions of the Alaska Statehood Act and other legislation are the following (the statutes are quoted in Appendix A).

1. The grant to the State of 90% of all money received by the United States pursuant to the mineral leasing laws in Alaska. The Alaska Statehood Act, 72 Stat. 339, Sec. 28(b).

2. The federal legislation which was confirmed and amended by the Statehood Act, Sec. 28(b). It provides that the State receives 90% of all money received by the United States pursuant to the mineral leasing laws in Alaska, 37 1/2% thereof for the construction of public roads or schools and 52 1/2% for the disposition of the State Legislature. 30 U.S.C. 191.

3. The federal legislation applicable to oil and gas leases of the United States provides for a minimum 12 1/2% royalty. 30 U.S.C. 226.

4. The state legislation applicable to oil and gas leases of the State of Alaska provides for a basic minimum 12 1/2% royalty, although, in the case of first discovery, there is a royalty of 5%. AS 38.05.180.

5. The disclaimer clause of the Alaska Statehood Act. 72 Stat. 339, Sec. 4.

II. DEFINITIONS

The logical point to begin the discussion of the question is with a definition of the term "overriding gross royalty." A leading text in the field describes the term in the following way.

"Perhaps the only safe way to define the term 'overriding royalty' is to say that it is a fractional interest in the gross production of oil and gas, in addition to the usual royalties paid to the lessor. The term may (sic) be used in referring to a nonparticipating royalty interest in perpetuity or for a term of years created by the land or mineral owner

The Honorable Wayne N. Aspinall
Washington, D. C.

September 5, 1969

- 3 -

prior to a lease for oil and gas. Grants by a lessee of a share of per cent of the production from a lease are sometimes called overriding royalties. A prospective lessee may agree to pay an overriding royalty, a certain share of the production, to another person as consideration for his services in procuring a lease on certain lands. Perhaps the most common use of the term is to indicate a share of the oil or gas produced reserved in an assignment, part assignment or sublease of an oil and gas lease, and payable to the assignor by the assignee, over and above the royalty reserved in the lease payable to the lessor." Summers Oil and Gas, Vol. 3, Sec. 554, pp. 624-626.

It is also necessary to note the following distinction between a "royalty" and an "overriding royalty."

"The question presented here is not who is entitled to a 'royalty' but who is entitled to an 'overriding royalty'. There is a difference. 'Royalty' generally means that fractional interest in the production of oil or gas which was created by the owner of the land either by reservation when the mineral lease was entered into or by direct grant to a third person. An 'overriding royalty' is a given percentage of the gross production payable to some person other than the lessor or persons claiming under him. Such interest develops where an owner of the working interest (as Texaco is here) contracts to deliver a part of the gross production to another, usually his assignor (the Trustee here)." Texaco v. Pigott, 235 F.Supp. 458, 464 (D.C. Miss. 1964).

III. STATE LEASES

The 2% overriding gross royalty cannot apply to a State of Alaska oil and gas lease issued pursuant to AS 38.05.180. This is true whether or not the 2% is a diversion of State revenues from the present 12 1/2% royalty or if the 2% is added to the present 12 1/2% royalty to make it a 14 1/2% royalty.

The Honorable Wayne N. Aspinall
Washington, D. C.

September 5, 1969
- 4 -

The real conflict between the 2% overriding gross royalty and the 12 1/2% royalty stated in AS 38.05.180 and included as a provision of state oil and gas leases is readily apparent. This is the case regardless of whether the 2% overriding royalty is retrospective so as to affect leases in existence at the time of the effective date of the settlement legislation or if it is prospective so as to affect only leases issued subsequent to the effective date of the legislation.

It is clear that Congress has no authority under the United States Constitution to amend State legislation and State contracts on matters within the province of State law. It is a fundamental principle of American jurisprudence that the supremacy clause of the United States Constitution is applicable only if the particular act of Congress is within the jurisdiction of Congress.

"In discussing these questions, the conflicting powers of the general and state governments must be brought into view, and the supremacy of their respective laws, when they are in opposition, must be settled.

If any one proposition could command the universal assent of mankind, we might expect it would be this--that the government of the Union, though limited in its powers, is supreme within its sphere of action. This would seem to result necessarily from its nature. It is the government of all; its powers are delegated by all; it represents all, and acts for all. Though any one state may be willing to control its operations, no state is willing to allow others to control them. The nation, on those subjects on which it can act, must necessarily bind its component parts. But this question is not left to mere reason; the people have, in express terms, decided it by saying, 'this constitution, and the laws of the United States, which shall be made in pursuance thereof,' 'shall be the supreme law of the land,' and by requiring that the members of the state legislatures, and the officers of the executive and judicial departments of the states shall take the oath of fidelity to it.

The Honorable Wayne N. Aspinall
Washington, D. C.

September 5, 1969

- 5 -

The government of the United States, then, though limited in its powers, is supreme; and its laws, when made in pursuance of the constitution, form the supreme law of the land, 'anything in the constitution or laws of any state to the contrary notwithstanding.'"
McCulloch v. The State of Maryland, 4 Wheat. 316, 405-406 (1819). (Emphasis added.)

Conversely, it is equally clear that a State has the authority under the Tenth Amendment to the United States Constitution to regulate those activities which occur within the State if Congress has not been granted such authority by the Constitution.

"We choose rather to plant ourselves on what we consider impregnable positions. They are these: that a State has the same undeniable and unlimited jurisdiction over all persons and things within its territorial limits, as any foreign nation, where that jurisdiction is not surrendered or restrained by the Constitution of the United States. That, by virtue of that, it is not only the right, but the bounden and solemn duty of a State, to advance the safety, happiness and prosperity of its people, and to provide for its general welfare, by any and every act of legislation which it may deem to be conducive to these ends; where the power over the particular subject, or the manner of its exercise is not surrendered or restrained, in the manner just stated. That all those powers which relate to merely municipal legislation, or what may, perhaps, more properly be called internal police, are not thus surrendered or restrained; and that consequently, in relation to these, the authority of a State is complete, unqualified and exclusive.

We are aware that it is at all times difficult to define any subject with proper precision and accuracy; if this be so in general, it is emphatically so in relation to a subject so diversified and multifarious as the one

The Honorable Wayne W. Aspinall
Washington, D. C.

September 5, 1969

- 6 -

which we are now considering." *New York v. Miln*, 11 Pet. 102, 138 (1937). (Emphasis added.)

The State of Alaska is entitled to the same rights as other states under the United States Constitution by virtue of the Statehood Act, Section 1, which provides that the State is on an "equal footing with the other states in all respects whatever. . ."

The Alaska State Legislature has properly determined what oil royalty rate should be charged lessees of State lands. The rates specified by the Legislature have been embodied in the respective leases entered into by the State and are a necessary condition of the State's contractual commitment. Neither Congress nor the Alaska State Legislature has the power to interfere with or ignore that commitment. Naturally, the Alaska Legislature can increase the royalty rates to be charged in future oil and gas leases, but it does not follow that Congress may do likewise. Congress may only supercede State legislation if it does not violate the Tenth Amendment to the United States Constitution.

There is no question that royalty legislation on State oil and gas leases is a matter within the paramount jurisdiction of the State. The conservation of oil and gas is a matter within the authority of the States.

"The paramount public interest of the state in the conservation of these natural resources, the right of the Legislature to enact reasonable laws having reasonable relation to that end, and of the Commission under the authority of those laws to make regulations to carry them into effect, have been uniformly recognized and sustained in the numerous litigations that have arisen in state and federal courts, in connection with state enforcement." *Griswold v. The President of the United States*, 82 F.2d 922, 925 (C.A. 5, 1936).

The royalty provisions of a mineral leasing act are related to conservation of natural resources.

The Honorable Wayne N. Aspinall
Washington, D. C.

September 5, 1969.
- 7 -

"The purpose of the Mineral Leasing Act was not to obtain sales for the gas from these reserves on Government land at any price. The Act was intended to promote wise development of these natural resources and to obtain for the public a reasonable financial return on assets that "belong" to the public. The Secretary of the Interior is the statutory guardian of this public interest. He has a responsibility to insure that these resources are not physically wasted and that their extraction accords with prudent principles of conservation. To protect the public's royalty interest he may determine that minerals are being sold at less than reasonable value. Under existing regulations he can restrict a lessee's production to an amount commensurate with market demand, and thus protect the public's royalty interest by preventing depression of the market. He may also establish "reasonable values" for royalty purposes. Of course his duties have another aspect. The public does not benefit from resources that remain undeveloped, and the Secretary must administer the Act so as to provide some incentive for development. He has statutory power to prescribe regulations to effectuate the purposes of the Act." California Company v. Udall, 296 F.2d 384, 388 (C.A.D.C., 1961). (Emphasis added.)

The conservation rationale behind royalty provisions has also been recognized by the State courts.

"That the operation may be conducted by a lessee required to pay royalties to the State does not destroy its public use character or render it a private enterprise. The end to be served is the conversion of public resources and the avoidance of waste thereof and the leasehold method must be viewed as no more than a means to that end." Opinion of the Justices, 216 A.2d 656, 660 (Me. 1966).

The Honorable Wayne N. Aspinall
Washington, D. C.

September 5, 1969

- 8 -

Furthermore, assuming for the purpose of argument that the royalty provision is a tax measure and not a conservation measure, the same principle of state sovereignty is applicable. "The States have a very wide discretion in the laying of their taxes. When dealing with their proper domestic concerns, and not trenching upon the prerogatives of the National Government or violating the guarantees of the Federal Constitution, the States have the attribute of sovereign powers in devising their fiscal systems to insure revenue and foster their local interests." Allied Stores of Ohio v. Bowers, 358 U.S. 522, 526 (1959).

A diversion of revenues which may be due to the State by virtue of State law and State leases is a flagrant violation of the United States Constitution. It not only goes beyond the scope of the supremacy clause of the Constitution, but it also takes the property of the people of the State of Alaska in violation of the due process clause of the Fifth Amendment to the Constitution. A provision of that nature constitutes a serious threat to any state government because it apparently recognizes a right of the federal government to control the finances and treasury of state government.

In accordance with the principle that the paramount interest in conservation or local taxation is with the states, the United States, under the Tenth Amendment to the Constitution of the United States, has no authority to legislate on state royalty provisions and state oil and gas leases.

IV. FEDERAL LEASES

The 2% overriding gross royalty cannot apply to a federal lease on public lands within the State of Alaska. This is true whether or not the royalty is retrospective or prospective from the effective date of the legislation.

The first case to examine is that of a 2% overriding gross royalty which would be supplementary to the current 12 1/2% federal royalty. This would result in a 14 1/2% royalty on federal oil and gas leases in Alaska, although 30 U.S.C. 226 provides for a minimum 12 1/2% royalty throughout the United States. It is apparent that such legislation would violate not only the "equal footing"

The Honorable Wayne N. Aspinall
Washington, D. C.

September 5, 1969
- 9 -

doctrine, but that it would also violate the equal protection and due process clauses of the U. S. Constitution to the extent that a lessee would not be accorded uniform treatment under federal legislation. It is true that federal legislation need not be uniform in its application throughout the United States, but it is equally true that the principle embodied within the legislation should be uniform.

"So far as uniformity is concerned, there is no question that the act uniformly applies to the conditions which call its provisions into play,--that its provisions apply to all the states,--so that the question really is a complaint as to the want of uniform existence of things to which the act applies, and not to an absence of uniformity in the act itself. But, aside from this, it is obvious that the argument seeks to engraft upon the Constitution a restriction not found in it; that is, that the power to regulate conferred upon Congress obtains subject to the requirement that regulations enacted shall be uniform throughout the United States."
James Clark Distilling Co. v. Western Maryland R. Co., 242 U.S. 311, 327, 37 S.Ct. 180, 185, 61 L.Ed. 326 (1917).

Also see St. Mary's Sewer P. Co. v. Director of U. S. Bureau of Mines (C.A.3, 1959), 262 F.2d 378. If there were no requisite that federal legislation be uniform throughout the United States, the result would be a gerrymandering of special legislation on not only minerals but also labor, banking, civil rights, and so forth.

The second case to examine is that of a 2% gross overriding royalty which would constitute a diversion of the current 12 1/2% federal royalty. Pursuant to the Alaska Statehood Act, Sec. 28(b), and 30 U.S.C. 191, the State of Alaska receives 37 1/2% and 52 1/2%, or a total of 90%, of "All money received from . . . royalties . . . of public lands under the provisions of sections . . . 226 . . . of this title . . ." If there were a diversion of 2% of the 12 1/2% royalty before the apportionment of the share of the State, the State would in effect be deprived of its 90% share of the 2% which had been diverted to the Alaska Natives. This is in conflict with the Alaska Statehood Act, and is discussed in the next section of this opinion.

The Honorable Wayne W. Aspinall
Washington, D. C.

September 5, 1969
- 10 -

V. THE ALASKA STATEHOOD ACT

The question which is raised by the conflict of the 2% royalty with the Alaska Statehood Act is the following. May the United States unilaterally enact legislation in direct conflict with the Statehood Act?

The answer to this is that the United States may not constitutionally enact effective legislation in direct conflict with compact provisions of the Statehood Act unless there is an amendment to the Constitution of the State of Alaska because a Statehood Act constitutes a compact in the nature of a contract between two sovereign governments.

First, the federal government may not unilaterally amend the Statehood Act. Beecher v. Wetherby (1877), 95 U.S. 440, held that the State of Wisconsin acquired title to lands formerly occupied by Indians by virtue of the grant of these lands to the State in the Statehood Act and that this title could not subsequently be divested by the federal government on the basis of other legislation. The court, at 441, with reference to the provision of the Statehood Act which granted the land to the State, said: "It was, therefore, an unalterable condition of the admission, obligatory upon the United States. . . ." Metlakatla Indian Com., Annette Island Res. v. Egan (Alaska 1961), 362 P.2d 901, reversed by 369 U.S. 45 on other grounds, held the Omnibus Act invalid to the extent it amended the Statehood Act. The court, at 911, stated: "Appellants argue that the amendment is part of the compact and merely clarified the original intent of Congress. We cannot accept this reasoning. It is our view that the amendment forms no part of the compact between Alaska and the United States."

Second, the state government may not unilaterally amend the Statehood Act. State v. Commissioners of the Land Office, (Okla. 1956), 301 P.2d 655, held that Oklahoma could not change by an amendment to its constitution and by statute a provision of the Statehood Act which provided for a trust fund of the proceeds of the sale of lands granted to the State for school purposes. The court, at 659, stated: "We hold the regulations in the Oklahoma Enabling Act . . . may not be modified, restricted or changed by an Act of the Oklahoma legislature or the people of Oklahoma in amendment of the Oklahoma Constitution."

The Honorable Wayne N. Aspinall
Washington, D. C.

September 5, 1969

- 11 -

Merrill v. Bishop (Wyoming 1955), 287 P.2d 620, held that the Wyoming Statehood Act legally abridged Indian water rights, and, at 625, said: ". . . the compact between the United States and Wyoming is unalterable and obligatory." Also see Boeing Aircraft Co. v. Reconstruction Finance Corp. (Wash. 1946) 181 P.2d 838, 842 (" . . . each government was bound by the provisions of the Enabling Act."), State v. Reynolds, (N.M. 1963) 378 P.2d 622, 627. ("Section 10 of the Statehood Act became a part of our fundamental law to the same extent as if it had been directly incorporated into the Constitution when thus expressly consented to by the State and its people in Article XXI, Section 9 of the Constitution.") Opinion of the Judges (S.D. 1966) 140 N.W.2d 34, 36 ("It cannot be revoked without the consent of the United States.") United States v. 111.2 Acres of Land in Ferry County, Wash., 293 F.Supp. 1042 (1968). ("The consent of the United States has not been manifested by amendment of the Enabling Act or by legislation inconsistent with Section 11 of that Act.")

Third, the only constitutional method by which there can be enacted legislation which is in direct conflict with the Statehood Act is the approval by the people of the State of Alaska of such federal legislation. The Alaska Statehood Act, Sec. 8(b) provided that the people of the State approve the Statehood Act at an election, and stated that an affirmative vote on the question would constitute an amendment to the State Constitution:

"In the event each of the foregoing propositions is adopted at said election by a majority of the legal votes cast on said submission, the proposed Constitution of the proposed State of Alaska, ratified by the people at the election held on April 24, 1956, shall be deemed amended accordingly."

The Constitution of the State of Alaska, Art. XIII, provides that amendments to the Constitution must be ratified by the people. State v. Paul, 337 P.2d 33 (Wash. 1959), which held that the Washington Enabling Act could be amended by the State Legislature is distinguishable because the court explicitly noted that the Constitution of the State of Washington at the time of the Enabling Act provided for no initiative or referendum.

**THE FOLLOWING PAGES MAY
NOT FILM LEGIBLY BECAUSE OF
THE POOR QUALITY OF THE ORIGINAL**

The Honorable Wayne M. Aspinall
Washington, D. C.

September 5, 1969
- 12 -

Fourth, the argument that Congress has the authority to enact Indian legislation in Alaska which will override the Statehood Act because of the "supremacy clause" principle is without merit. An inference of this argument is that the United States may be about to enter into a treaty with the Alaska Natives. The inference is unwarranted. "The use of the treaty lawmaking power to deal with Indians as dependent alien nationalities, and to adjust their problems, as proper matters of international concern, was halted by Congress in 1871." Federal Indian Law, U. S. Department of the Interior, 1958, p. 25. Another inference may be that the "plenary" federal power over Indian affairs places federal Indian law apart from the United States Constitution. Again, the inference is unwarranted.

"Thus in United States v. Kagama the Supreme Court found that the protection of the Indians constituted a national problem and referred to the practical necessity of protecting the Indians and the withholding of such a power from the States. This is the basis for the so-called "plenary" power of Congress over the Indians, or, more qualifiedly, over "Indian tribes" or "tribal Indians," so frequently used in recent cases. It may seem captious to point out that there is authority for the view that Congress has no constitutional power over Indians except what is specifically conferred by the commerce clause and implied in other clauses of the Constitution. The most famous defender of Federal power over Indians, Chief Justice Marshall, declared:

. . . That instrument [the Constitution] confers on congress the powers of war and peace; of making treaties, and of regulating commerce with foreign nations, and among the several states, and with the Indian tribes. These powers comprehend all that is required for the regulation of our intercourse with the Indians. They are not limited by any restrictions on their free actions; the shackles imposed on this power, in the confederation, are discarded (p. 559).

The Honorable Wayne M. Aspinall
Washington, D. C.

September 5, 1969
- 13 -

Whatever view be taken of the possibility or danger of "emergency" powers arising from "necessity," it is clear that the powers mentioned by Chief Justice Marshall proved to be so extensive that the Federal powers exercised over Indian affairs are as wide as State powers over non-Indians, and therefore the statement in characterizing such Federal power as "plenary." This does not mean, however, that congressional power over Indians is so broad as to express constitutional limitations, such as the Bill of Rights. General Indian Law, infra, p. 24. (Emphasis added.)

The "plenary" power doctrine simply means that the United States has extensive power over American Indians in certain circumstances, and it does not mean that the United States has an authority in Indian affairs that is so absolute that it may disregard the United States Constitution. The Congress, pursuant to the United States Constitution, Article IV, Sec. 3, enacted the Alaska Statehood Act, and the State of Alaska is now on an "equal footing" with the other states. The "plenary" Indian power of the United States does not recognize in Congress the authority to abrogate the Statehood Act.

Fifth, the disclaimer clause of the Alaska Statehood Act, Section 4, does not constitute authority in Congress to legislate in derogation of the Statehood Act. That clause simply provides that the State disclaims all right and title to any lands or other property which "may" be held by Alaska Natives. The legal question which arises from that involves the selection by the State of lands claimed by Alaska Natives, and not the question of revenue sharing proposals which properly relate to monetary compensation alone. The legal question of the selection rights of the State of land claimed by Alaska Natives is discussed in Kake Village v. Egan, 369 U.S. 60, at 65-66 (1962).

"Section 4 must be construed in light of the circumstances of its formulation and enactment. See Alaska Pacific Fisheries v. United States, 248 U.S. 78, 87. Congress was aware that few such rights existed in Alaska. Its concern was to preserve the status quo with

The Honorable Wayne N. Aspinall
Washington, D. C.

September 5, 1969
- 14 -

respect to aboriginal and possessory Indian claims, so that statehood would neither extinguish them nor recognize them as compensable. See, e.g., House Hearings, supra, 130, 384 (1955) (Delegate Bartlett); Hearings Before Senate Committee on Interior and Insular Affairs on S. 50, 83rd Cong., 2d Sess. 227 (Senator Jackson), 260-261 (1954). 1/

Discussion during hearings on the 1955 House bill affords further evidence that claims not based on federal law are included. Section 205 of that bill (like sec. 6 of the bill as enacted) authorized Alaska to select large tracts of United States land for transfer to state ownership. It was understood that the disclaimer provision left the State free to choose Indian "property" if it desired, but that such a taking would leave unimpaired the Indians' right to sue the United States for any compensation that might later be established to be due. See House Hearings, supra, 135 (1955) (Delegate Bartlett). Feeling that experience had shown this procedure too slow to give prompt relief to the Indians, Oklahoma's Representative Edmondson proposed to exempt Indian property from the State's selection. Id. at 381. This was rejected as virtually destroying Alaska's right to select lands. For, although Representative Edmondson pointed

1/ In 1948 a statehood bill requiring disclaimer of "all lands . . . owned or held by any . . . natives, the right or title to which shall have been acquired through or from the United States or any prior sovereignty," was favorably reported with this explanation: "As proposed to be amended, this paragraph would preserve all existing valid native property rights in Alaska, including those derived from use or occupancy, together with all existing authority of the Congress to provide for the determination, perfection or relinquishment of native property rights in Alaska. It would neither add to nor subtract from such rights and such authority, but would simply maintain the status quo." H.R. Rep. No. 1731, 80th Cong., 2d Sess. 15 (1948).

To the same effect, see H.R. Rep. No. 255, 81st Cong., 1st Sess. 13 (1949).

The Honorable Wayne M. Aspinall
Washington, D. C.

September 5, 1969
- 15 -

out that the disclaimer extended only to property owned by Indians or held in trust for them, four representatives clearly stated their belief that the disclaimer included not just the few Alaska reservations, but also the aboriginal or other unproved claims in dispute, which covered most if not all of Alaska. Id., at 383 (Representative Engle Dawson, Alaska's first Senator). (Emphasis added.)

There is, therefore, no merit to the argument that Congress may re-write the Statehood Act because of the Section 4 disclaimer clause. The inclusion of that clause in the Statehood Act did not make that Act an open-ended document which may be unilaterally amended by Congress. A contrary assertion ignores the basic significance of a statehood act. The precise question of the effect of the disclaimer clause has been considered by the U. S. Supreme Court, and that Court has said that the Congress only intended the disclaimer clause to leave unimpaired possible future rights of the Alaskan Natives to compensation from the United States. The method of the compensation, of course, must be within the principles of the United States Constitution.

VI. CONCLUSION.

The State of Alaska, pursuant to the Alaska Statehood Act, does have rights under the United States Constitution. The argument that the supremacy clause of the United States Constitution places rights in Congress over Indians of such an extent that Congress may enact legislation which abrogates the constitutional rights of a State or of any person is clearly erroneous. The ultimate criterion of legitimacy in the American system is not the supremacy clause in itself, but the supremacy clause in the context of the United States Constitution. The clearest and most forceful statement of the applicability of the supremacy clause in the present case is not that Congress may violate the Constitutional rights of a State, but that it might extinguish Indian title without compensation.

"In 1941 a unanimous Court wrote,
concerning Indian title, the following:

Opinion No. 6

The Honorable Wayne W. Aspinall
Washington, D. C.

September 5, 1969

- 16 -

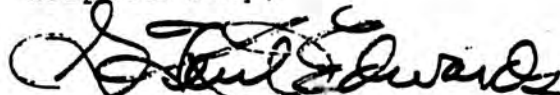
'Extinguishment of Indian title based on aboriginal possession is of course a different matter. The power of Congress in that regard is supreme. The manner, method and time of such extinguishment raise political, not justiciable, issues.' United States v. Santa Fe Pacific R. Co., 314 U.S. 339, 347, 86 L.ed. 260, 270, 62 S.Ct. 248.

No case in this Court has ever held that taking of Indian title or use by Congress required compensation. The American people have compassion for the descendants of those Indians who were deprived of their homes and hunting grounds by the drive of civilization. They seek to have the Indians share the benefits of our society as citizens of this Nation. Generous provision has been willingly made to allow tribes to recover for wrongs, as a matter of grace, not because of legal liability. 60 Stat. 1050." Tee-Hit-Ton Indians v. United States, 348 U.S. 272, 281 (1955). (Emphasis added.)

The real effect of the Section 4 disclaimer clause was to insure that Congress in no way affected whatever claims Alaska Natives might have against the United States for monetary compensation.

The State of Alaska supports the principle of compensation to Alaskan Natives, but only to the extent that there is no interference with the rights of the State under the Statehood Act. The 2% overriding gross royalty is in conflict with the Statehood Act and principles of constitutional law, and Congress has no authority under the United States Constitution to enact such legislation.

Respectfully,



G. Kent Edwards
Attorney General

APPENDIX A

1. The grant to the State of 90% of all money received by the United States pursuant to the mineral leasing laws in Alaska. The Alaska Statehood Act. 72 Stat. 339, Sec. 28(b).

"(b) Section 35 of the Act entitled 'An Act to promote the mining of coal, phosphate, oil, oil shale, gas, and sodium on the public domain', approved February 25, 1920, as amended (41 Stat. 450), is hereby amended by inserting immediately before the colon preceding the first proviso thereof the following: ", and of those from Alaska 52 1/2 per centum thereof shall be paid to the State of Alaska for disposition by the legislature thereof". 72 Stat. 339, Sec. 28(b).

2. The federal legislation which was confirmed and amended by the Statehood Act, Sec. 28(b). It provides that the State receives 90% of all money received by the United States pursuant to the mineral leasing laws in Alaska, 37 1/2% thereof for the construction of public roads or schools and 52 1/2% for the disposition of the State Legislature. 30 U.S.C. 191.

"All money received from sales, bonuses, royalties, and rentals of public lands under the provisions of sections 181-184, 185-188, 189-192, 193, 194, 201, 202-209, 211-214, 223, 224-226, 226-2, 227-229a, 241, 251, and 261-263 of this title shall be paid into the Treasury of the United States; 37 1/2 per centum thereof shall be paid by the Secretary of the Treasury as soon as practicable after December 31 and June 30 of each year to the State or the Territory of Alaska within the boundaries of which the leased lands or deposits are or were located; said moneys to be used by such State, Territory, or subdivision thereof for the construction and maintenance of public roads or for the support of public schools or other public educational institutions, as the legislature of the State or Territory may direct; and, excepting those from Alaska, 52 1/2 per centum thereof shall be paid into, reserved and appropriated, as a part of the reclamation fund created by sections 372, 373, 381, 383, 391, 392, 411, 416, 419, 421, 431, 432, 434, 439, 461, 491, and 498 of Title 43, and of those from Alaska 52 1/2 per centum thereof

shall be paid to the State of Alaska for disposition by the legislature thereof:
Provided, That all moneys which may accrue to the United States under the provisions of sections 181-184, 185-188, 189-192, 193, 194, 201, 202-209, 211-214, 223, 224-226, 226-2, 227-229a, 241, 251, and 261-263 of this title not otherwise disposed of by this section shall be credited to miscellaneous receipts. As amended May 27, 1947, c. 83, 61 Stat. 119; Aug. 3, 1950, c. 527, 64 Stat. 402; July 10, 1957, Pub.L. 85-508, Secs. 6(k), 28(b), 72 Stat. 343, 351." 30 U.S.C. 191. (Emphasis added.)

3. The federal legislation applicable to oil and gas leases of the United States provides for a minimum 12 1/2% royalty. 30 U.S.C. 226.

"(a) All lands subject to disposition under sections 181-184, 185-188, 189-192, 193, 194, 201, 202-209, 211-214, 223, 224-226, 226-2, 227-229a, 241, 251, 261-263 of this title which are known or believed to contain oil or gas deposits may be leased by the Secretary.

Lands within known geologic structure
of a producing oil or gas field; com-
petitive bidding

(b) If the lands to be leased are within any known geological structure of a producing oil or gas field, they shall be leased to the highest responsible qualified bidder by competitive bidding under general regulations in units of not more than six hundred and forty acres, which shall be as nearly compact in form as possible, upon the payment by the lessee of such bonus as may be accepted by the Secretary and of such royalty as may be fixed in the lease, which shall not be less than 12 1/2 per centum in amount or value of the production removed or sold from the lease.

Lands not within geologic structure
of a producing oil or gas field;
first qualified applicant

(c) If the lands to be leased are not within any known geological structure of a

producing oil or gas field, the person first making application for the lease who is qualified to hold a lease under sections 181-184, 185-188, 189-192, 193, 194, 201, 202-209, 211-214, 223, 224-226, 226-2, 227-229a, 241, 251, 261-263 of this title shall be entitled to a lease of such lands without competitive bidding. Such leases shall be conditioned upon the payment by the lessee of a royalty of 12 1/2 per centum in amount or value of the production removed or sold from the lease." 30 U.S.C. 226. (Emphasis added.)

4. The state legislation applicable to oil and gas leases of the State of Alaska provides for a basic minimum 12 1/2% royalty, although, in the case of first discovery, there is a royalty of 5%. AS 38.05.180.

"AS 38.05.180. OIL AND GAS. (a) All tide and submerged lands, mental health lands, school lands, and university lands shall be leased by competitive bidding, and whenever oil or gas is discovered in commercial quantities, the commissioner shall determine the extent of the area of lands in addition to tide, submerged, mental health lands, school, or university lands in the same general area of the discovery well which, by reason of the discovery, the commissioner reasonably believes to be capable of producing oil or gas and the additional lands shall be leased to the highest responsible qualified bidder by competitive bidding under general regulations in units of not exceeding 2,560 acres (except that tide and submerged lands shall be leased in units of not exceeding 5,760 acres), which shall be as nearly compact in form as possible, upon the payment by the lessee of such bonus as may be accepted by the commissioner and of such royalty as may be fixed in the lease which shall not be less than 12 1/2 per cent in amount or value of the production removed or sold from the lease. However, the holder of a lease who drills and makes the first discovery of oil or gas in commercial quantities in a geologic structure shall pay a royalty on all production under the lease of five per cent for 10 years following the date of discovery and thereafter the royalty rate shall be not less

than 12 1/2 per cent unless the commissioner specifically provides that such royalty shall be less at the time such lands are offered for lease and in no event shall such royalty be less than five per cent. All lands other than those above provided to be leased by competitive bidding may be leased competitively or noncompetitively as determined by the commissioner to be in the best interests of the state. Noncompetitive leases shall be issued in units of not exceeding 2,560 acres in any one lease. Noncompetitive leases shall be conditioned upon the payment by the lessee of a royalty of 12 1/2 per cent in amount or value of the production removed or sold from the lease. However, the holder of a lease who drills and makes the first discovery of oil or gas in commercial quantities in a geologic structure shall pay a royalty on all production under the lease of five per cent for 10 years following the date of discovery and thereafter the royalty rate is 12 1/2 per cent. Competitive leases issued under this subsection shall be for a primary term of five years and shall continue so long thereafter as oil or gas is produced in paying quantities. If drilling has commenced on the expiration date of the primary term of the lease and is continued with reasonable diligence, such operations to include redrilling, sidetracking or other means necessary to reach the originally proposed bottom hole location, the lease shall continue in effect until 90 days after drilling has ceased and for so long thereafter as oil or gas is produced in paying quantities. If all or part of the lands covered by the lease are lands that have been selected by the state under laws of the United States granting lands to the state and a conditional lease was issued thereon, the term of the lease shall be extended for a period equal to the period during which the lease was conditional."

5. The disclaimer clause of the Alaska Statehood Act. 72 Stat. 339, Sec. 4.

"Sec. 4. As a compact with the United States said State and its people do agree and declare that they forever disclaim all right and title to any lands or other property not granted or confirmed to the State

or its political subdivisions by or under the authority of this Act, the right or title to which is held by the United States or is subject to disposition by the United States, and to any lands or other property (including fishing rights), the right or title to which may be held by any Indians, Eskimos, or Aleuts (hereinafter called natives) or is held by the United States in trust for said natives; that all such lands or other property belonging to the United States or which may belong to said natives, shall be and remain under the absolute jurisdiction and control of the United States until disposed of under its authority, except to such extent as the Congress has prescribed or may hereafter prescribe, and except when held by individual natives in fee without restrictions on alienation: Provided, That nothing contained in this Act shall recognize, deny, enlarge, impair, or otherwise affect any claim against the United States, and any such claim shall be governed by the laws of the United States applicable thereto; and nothing in this Act is intended or shall be construed as a finding, interpretation, or construction by the Congress that any law, applicable thereto authorizes, establishes, recognizes, or confirms the validity or invalidity of any such claim, and the determination of the applicability or effect of any law to any such claim shall be unaffected by anything in this Act: And provided further, That no taxes shall be imposed by said State upon any lands or other property now owned or hereafter acquired by the United States or which, as hereinabove set forth, may belong to said natives, except to such extent as the Congress has prescribed or may hereafter prescribe, and except when held by individual natives in fee without restrictions on alienation." Alaska Statehood Act, 72 Stat. 339, Sec. 4.

NOTE

OPINION NUMBER 6 OF 1969 WAS NEVER ISSUED.

SCOMM

99:20

FISCAL NOTE

REQUEST:

Revision Date: _____ Affected Agency: _____
Title: Amend US Constitution to BRU: _____
limit Federal Courts
Sponsor: Representative Vezey Components: _____
Requestor: World Trade St/Fed Rel.

EXPENDITURES/REVENUES: (THOUSANDS OF DOLLARS)

OPERATING	FY 96	FY 97	FY 98	FY 99	FY 2000	FY 2001
Personal Services						
Travel						
Contractual						
Supplies						
Equipment						
Land & Structures						
Grants, Claims						
Miscellaneous						
TOTAL OPERATING	-0-					

CAPITAL	-0-					
---------	-----	--	--	--	--	--

REVENUE	-0-					
---------	-----	--	--	--	--	--

FUNDING: (THOUSANDS OF DOLLARS)

General Fund	-0-					
Federal Fund						
Other						
TOTAL	-0-					

POSITIONS:

Full-Time	-0-					
Part-Time						
Temporary						

Estimated FY 95 Impact: -0-

ANALYSIS: (ATTACH A SEPARATE PAGE IF NECESSARY)

Prepared By: World Trade and State/Federal Relations Date: 3/20/95
Division: _____ Phone: _____
Approved By: [Signature]
Agency: World Trade and State/Federal Relations Date: 3/20/95

DISTRIBUTION (BY PREPARER
LEGISLATIVE FINANCE
LEGISLATIVE SPONSOR

REQUESTOR
OFFICE OF MANAGEMENT AND BUDGET
AGENCY(IES)

Alaska State Legislature

House of Representatives

Official Business



State Capitol
Juneau, Alaska 99801-1182
(907) 465-3718

House Majority Leader

SPONSOR STATEMENT

The purpose of HJR-30 is to petition the Congress of the United states to prepare and present to the legislatures of all the states an amendment to the Constitution of the United States. This amendment would prohibit the Supreme Court or any inferior court of the United States, from ordering a state or political subdivision of a state to levy or increase taxes.

The resolution comes as a request from the office of Representative Bill Skaggs, from the state of Missouri. This effort was brought about by a court case in Missouri, whereby the Supreme Court mandated the city of Kansas City to charge a tax to fund desegregation expenses ordered by the courts.

Presently there are ten states which have introduced a similar resolution.

**DIVISION OF LEGAL SERVICES
LEGISLATIVE AFFAIRS AGENCY
STATE OF ALASKA**

(907) 465-3867 or 465-2450
FAX (907) 465-2029
Mail Stop 3101

130 Seward Street, Suite 409
Juneau, Alaska 99801-2105

MEMORANDUM

March 7, 1995

SUBJECT: Amendment to the United States Constitution (HJR 30)

TO: Representative Al Vezey
House Majority Leader

FROM: Tamara Brandt Cook *TBC*
Director

HJR 30 requests the United States Congress to propose an amendment to the Constitution to prohibit federal courts from ordering states or political subdivisions to impose or increase taxes. Under Article V of the U.S. Constitution Congress may propose amendments. Additionally, upon application of the legislatures of two thirds of the states, Congress is required to call a convention for the purpose of considering amendments. This latter method has never been used and there is considerable debate about whether a convention may be limited to consideration of only a specific amendment or whether, having called a convention, any amendment may be considered. Because of this uncertainty, I have not in this resolution included a request that a convention be called for the limited purpose of considering a specific amendment relating to court ordered taxation.

TBC:glc
95-197.glc

Enclosure



Official Business

Alaska State Legislature

State Capitol
Juneau, AK 99801-1182

MEMORANDUM

TO: Mike Nizich, Governor's Office

FROM: Wayne Maloney, Staff, WTR, Room 403, Capitol

DATE: March 16, 1995

Please prepare a fiscal note on HJR 30, "Amend U.S. Constitution to Limit Federal Courts." The resolution is scheduled for a hearing at 5:00 P.M. Tuesday, March 21st.

We would appreciate receiving the fiscal note by 5:00 P.M. Monday. Thanks for your help.

Alaska State Legislature

House of Representatives

Official Business



State Capitol
Juneau, Alaska 99801-1182
(907) 465-3718

House Majority Leader

MEMORANDUM

March 6, 1995

TO: Rep. Ramona Barnes, Chair, World Trade and State Federal Relationships

FROM: Rep. Al Vezey

SUBJECT: Scheduling of HJR-30 for public hearing.

Please schedule HJR-30 for public hearing at your earliest convenience.

Your help in this matter is appreciated.

MAR-07-1995 14:04

SEC3JUNEAU CHAMBER

907 463 5670 P.01

JOHN A. SANDOR

P O Box 21135

Juneau, Alaska 99802-1135

PHONE: (907) 588-2497

FAX: (907) 588-2490

March 6, 1995

MEMORANDUM

TO: Ronald L. Klaphake, President
Missoula Area Economic
Development Council
127 East Front Street, Suite 216
Missoula, Montana 59802

FAX: (406) 721-5034

FROM:

John A. Sandor

SUBJECT: REINVENTION OF THE FOREST SERVICE: A COMMUNITY RESPONSE

Thank you for sending me Missoula, Montana's: "REINVENTION OF THE FOREST SERVICE: A COMMUNITY RESPONSE".

This is an excellent, constructive response to the USDA-Forest Service Reinvention Plan approved by USDA Secretary Espy, shortly before his resignation from the U.S. Department of Agriculture.

A number of points in Missoula's "Community Response", are similar to the concerns outlined in the Alaska State Legislature's Senate Joint Resolution No. 12, which advocates that implementation of the plan be suspended pending Congressional review and consultation with local governments. This Resolution passed the Alaska Senate 18 to 1.

Representatives of other states have also proposed alternative "reinvention of government" strategies. Arizona Governor Fife Symington's "ARIZONA LAND POLICY 2000" is another excellent alternative to the USDA-Forest Service's Reinvention Plan, and the Governor described this in a May 19, 1994 letter to Secretaries Babbitt and Espy.

Because of the broad-based concerns with the USDA-Forest Service Reinvention Plan, and the importance of consulting with state and local governments, I am hopeful USDA Secretary-Designate Glickman would agree to suspend implementation of the plan approved by Secretary Espy, until he has had a chance to review the plan and consult with members of Congress and the states which have expressed concerns.

Once again, thank you for sending me this important document.

cc: Alaska Congressional Delegation; US Senate/House Resource Committees
M. J. Hassell, Commissioner, Arizona Land Department
John Katz, Office of the Governor of Alaska, Washington, D.C.

REINVENTION OF THE FOREST SERVICE: A COMMUNITY RESPONSE

Missoula, Montana, U.S.A

February 21, 1995

Members of several Missoula community organizations have been meeting since December to review and share ideas regarding the Forest Service reinvention plan. While our concern for jobs in Missoula is important, of much greater importance are broader issues that affect all regions and citizens of the United States. We support changes that will improve the quality of ecological management of Forest Service lands as proposed in the reinvention document, but we are not in support of some of the structural changes as presented. Many good ideas are represented in the strategic plan; implementation of agency goals, however, will require public trust. Trust will come only if the Forest Service is willing to give serious consideration to concerns expressed by the public. We hereby ask the Forest Service to constructively consider the following principles and issues in revising the December 6, 1994 reinvention proposal:

Consider All The Scientific Evidence On Ecological Regionalization. An immediate concern is the misrepresentation of the major part of the Northern Rocky Mountains (western Montana, Northern Idaho, and northeastern Washington) as part of a "Dry Temperate Steppe Region". Overwhelming, long-term scientific documentation treats the area as a "Temperate Mesophytic Coniferous Forest Region". This area has more similarity with west-side Oregon and Washington forests than with the central and southern parts of the Northern Plains. Splitting the Northern Rocky Mountains in a north-south manner to accommodate headquarters locations in Denver, Colorado, and Ogden, Utah, cannot be ecologically justified. A closer examination of published, ecological regionalization schemes is needed to truly make ecological considerations part of the rationale for adjusting regional boundaries.

Establish Regional Boundaries In Relation To Distribution Of Lands And People. Any map of the United States showing distribution of national forest system lands clearly illustrates why the Northern Region was established as "Region One". The greatest concentration of national forest land is in the Northern Rockies of northern Idaho and western Montana. This region also represents the greatest concentration of Forest Service employees close to the land, serving the people. Moving regional decision-makers—away from concentrated areas of Forest Service lands and worker activity—to remote urban areas runs counter to the concept of decentralization and responsibly "caring for the land and serving the people."

Revise Regional Operations To Obtain Benefits Of Decentralization. We fully support reduction of the size and cost of regional offices. All offices can be streamlined, with many functions transferred to the forest and district levels. This re-engineering to flatten the organization and get resources and decision-making closer to the land and people is well documented and widely supported. The consolidation of

MAR-07-1995 14:05

SEC3JUNEAU CHAMBER

907 463 5670 P.03

regions, however, sends exactly the opposite message to employees and the public. Consolidating regions creates employee resistance to the strategic plan as a whole. Locating regional offices and decision-making nearer to the land, nearer to the employees, and nearer to the public—regularly and intimately associated with national forest system lands—allows the Forest Service to reap the benefits of decentralization.

Consider The Economic Implications of Proposed Changes. Given the adaptive nature of the reinvention process, some of the economic implications are difficult to estimate. It is clear that the Region One office has a substantial impact on the Missoula area economy while some other regions do not impact their economies as significantly. The office's current employment of 326 workers and payroll of approximately 18 million dollars represents five percent of the Missoula County economic base. In addition, the office spends approximately \$5 million annually in the Missoula area on supplies, furnishings, and business services. The economic impact of the regional office is more than these direct expenditures. For example, the regional office generates considerable economic activity in the form of travelers coming to Missoula. In 1993, for example, an estimated 1,900 Forest Service employees traveled to Missoula for training sessions sponsored by the region. Assuming an average length of stay and average spending for business travelers, total expenditures in the Missoula area were \$600,000; of that, \$185,000 was spent on retail purchases, \$155,000 in eating and drinking establishments, \$115,000 for hotels and motels, \$95,000 on gasoline, auto rentals and other transportation, and \$50,000 on miscellaneous services. This represents only Forest Service training sessions in Missoula and does not include the large number of private sector and other federal employees coming to Missoula to do business with the regional office.

Support Rather Than Abolish The Northern Region. The Northern Region has provided strong leadership for Forest Service efforts in new perspectives and the move toward ecosystem management through sustainable ecosystems proposals and strategies. The Northern Region already is part of a "National Center of Excellence" in public land and natural resource management, practicing a greater degree of collaboration with a wider range of "partners" than most, if not all, other regions in the country. Forestry interests are represented by the 1,000-student School of Forestry at the University of Montana, the Montana Forest and Conservation Experiment Station, the Northern Fire Laboratory, the Northern Aerial Fire Depot and Smokejumper Center, the Missoula Forestry Sciences Laboratory, the Aldo Leopold Wilderness Research Center, the Arthur Carhart National Wilderness Training Center, and the Missoula Technology Development Center. Partners in the collaboration include the headquarters for the Montana State Forester, the Rocky Mountain Elk Foundation, the Boone and Crockett Club, the field offices for the National Wildlife Federation, the Craighead Wilderness and Wildlife Institute, the Defenders of Wildlife, the Montana Department of Fish, Wildlife and Parks, and the Intermountain Forest Industry Association, as well as numerous other environmental interest groups. Where is there a better location to implement collaboration on natural resource issues? Removal of regional forest service leadership to a far-removed, urban location is out of context with the collaboration and partnership principles espoused in the Forest Service's strategic plan and with the opportunities that already exist in Missoula.

MAR-07-1995 14:06

SEC&JUNEAU CHAMBER

907 463 5670 P.04

In addition, the proposed relocation runs counter to the intent of providing for better land stewardship and public service. We believe that decisions of a regional leadership team are best made by people living in the affected communities and near to the land. Denver, Colorado, and Ogden, Utah, are very remote from western Montana and Idaho. Western Montana and northern Idaho have long been recognized as part of the greater Pacific Northwest or the Inland Empire as a cultural, scientific, and socio-economic region. There are few significant cultural ties between the Northern Rockies and Denver or Ogden.

Consider An Emerging Paradigm In Social-Political Structure. One of the benefits of ecosystem management policy and philosophy should be serious reexamination of local-state-federal relationships. Considerable literature emanating from the Center for the New West and other sources has challenged existing paradigms and the common cultural and political baggage of thinking about communities and regions. Current classification schemes limit our understanding of how local, state, and federal entities might operate together to support effective socio-economic systems. National policy has misled communities into believing they can prosper independently of one another. The focus needs to be on real places (communities) and the regions surrounding them, whose long-term prosperity depends upon figuring out how to make social regions operate as natural economies, such as they are capable of being. National agencies need to help nurture these concepts of social reorganization rather than continue to strengthen top-down strategies that hinder, rather than help communities and states in meeting the needs of their citizens. This philosophy, if endorsed, would lead to true decentralization of government organizational structures designed to more effectively care for the land and serve the people. It follows, therefore, that smaller regions would be more effective than larger regions for federal agencies.

SUMMARY. The principles that are articulated above suggest maintaining regional decision-making in the Northern Rockies, and distributing rather than consolidating control. In addition, these principles call for building on the strengths of established collaboration, restoring an administrative leadership presence of Forest Service research in the Northern Rockies, and following social-economic boundaries wherever possible to make government work for the people. In essence, this means implementing ecosystem management policy in a decentralized manner. Retaining the Northern Region and letting agency structure be secondary to accomplishing the noble goals and objectives of caring for the land and serving the people is the natural conclusion. The strategic plan is timely and will stimulate action. If the Department of Agriculture and Forest Service respond to suggestions for change, then the goals will be accomplished sooner, rather than later. We offer to help in any way that we can.

MAR-07-1995 14:07

SEC3JUNEAU CHAMBER

907 463 5670 P.05

OFFICE OF THE GOVERNOR
STATE OF MONTANA

MARC RACICOT
GOVERNOR

STATE CAPITOL
HELENA, MONTANA 59620-0501

December 15, 1994

Jack Ward Thomas, Chief
U.S. Forest Service
14th & Independence, SW
P.O. Box 96090
Washington D.C. 20090

Dear Chief Thomas:

The unexpected disclosure of a massive Forest Service reorganization and deployment to Denver of the Northern Region office at Missoula has caused considerable turmoil and concern in Montana.

Reorganization is, of course, an essential element of management. The world is changing, the public is changing, and government -- local, state and federal -- must change and adapt as well.

At the state level, we are no strangers to reorganization. We are currently proposing sweeping reorganizational initiatives ourselves. Education governance, public health and human resources as well as natural resources management are all the subject of historic reorganization attempts. Our Legislature, which will begin meeting in Helena in a few short days, will have substantial say over our reorganization efforts.

Through legislative hearings, the public will have several meaningful opportunities to comment and help shape these reorganization proposals. Impacted state employees, impacted interest groups, environmental groups and industry groups, public health officials and county officers, private health care providers and senior citizen organizations and many, many others will all comment, all contribute to our state government reorganization efforts. Some will certainly not like our reorganization plans. Some will tell us so in no uncertain terms. But we want to hear from these people because they are important to helping us shape a final product, should the Legislature allow a final product.

In paging through your Reinvention of the Forest Service: The Changes Begin document, released December 6, 1994, there is no solicitation of public comment or a published address to send

MAR-07-1995 14:07

SEC&JUNEAU CHAMBER

907 463 5670 P.06

Jack Ward Thomas
Page 2
December 15, 1994

comments to. In a 55-page book it would seem appropriate to at least once encourage the public -- people who own this government -- to offer relevant comment.

The unfortunate manner in which the announcement was handled from Washington and the manner in which the public has been excluded from consideration in your reorganization agenda cannot escape notice. The issue of appropriate public involvement appears, sadly, to have been ignored by the authors of your reorganization plan.

Relocating the Northern Region Forest Service office to Denver may make sense to other federal officials in Denver. And while the zeal for close federal partnerships is admirable, improved federal communication with other federal employees can be accomplished without moving all decision-making to Denver. Improved coordination with other Forest Service officials and other federal agencies should not, by itself, necessitate relocating actual decision-makers from the actual area impacted by those decisions.

In Montana, the Forest Service is involved in a bull trout restoration effort, grizzly bear restoration program, PACFISH, the Eastside Assessment process, individual forest plan revisions, a major grazing lawsuit on the Beaverhead National Forest and, to a degree, wolf recovery and Yellowstone Park bison management. Perhaps someone can explain to me how removing a regional forester from the front line of so many issues through consolidation in downtown Denver will improve Forest Service responsibility in these issues?

As a result in part of federal forest mismanagement, Montana's public forests narrowly escaped catastrophic conflagration this summer. Perhaps it is obvious to others how a group-thought process by Denver Forest Service officials will improve Montana forest health and provide the necessary direction for improved forest stewardship and fire suppression. Could someone make that obvious to me? Quite frankly, Chief, I think the Forest Service needs fewer Forest Service employees in places like Denver and more Forest Service front line workers in places like Hamilton, Kalispell and Dillon.

There are obvious, and serious, economic ramifications associated with the proposed Forest Service reorganization. Those economic aspects are important, and must be examined by the Forest Service in full public light, with full public disclosure and in as much detail as possible. But service to the landscape, service to forest users, service in partnership with state agency officials and service to forest health should be the guiding force in your reorganization agenda.

Finally, it is interesting that on page 55 of your Changes Begin document the 19 individuals who formed "the team" that developed

To: Senator Taylor

From: Southeast Conference

3-8-95 8:16am p. 8 of 10

MAR-07-1995 14:08

SEC&JUNEAU CHAMBER

907 463 5670 P.07

Jack Ward Thomas

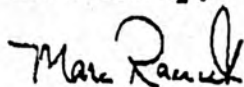
Page 3

December 15, 1994

the reorganization proposal are listed. None of the 19 are from the Northern Region. Not only did the development of the plan prevent meaningful public involvement, representatives from this special piece of the Forest Service domain appear to have been excluded from participation.

Thank you for your thoughtful consideration of my comments.

Sincerely,



MARC RACICOT
Governor

DRAFT (1/23/95)

**A JOINT RESOLUTION OF THE SENATE AND THE HOUSE OF REPRESENTATIVES
OF THE STATE OF MONTANA OPPOSING THE PROPOSED U.S. FOREST SERVICE
MISSOULA REGIONAL OFFICE CLOSURE AND RESTRUCTURING WHICH
RELOCATES FOREST SERVICE DECISION-MAKING OVER MONTANA NATIONAL
FORESTS TO DENVER, COLORADO.**

WHEREAS, the vital role of our nation's forests was officially recognized in 1891 when the first federal forest reserves were set aside by Congress and the forerunner of the national forest system was established; and

WHEREAS, the people of Montana have long enjoyed both tangible and intangible benefits from the presence and management activities of the U.S. Forest Service, which is distinct from most federal and other governmental agencies in the strength and diversity of land management and traditions; and

WHEREAS, the U.S. Forest Service has recently proposed a restructuring which would close its Missoula Regional Office and relocate this office's decision-making authority and personnel to Denver; and

WHEREAS, Missoula is at the heart of the Forest Service Northern Region encompassing 15 National Forests, 4 National Grasslands, and 28 million acres of forest, including 5 million acres of classified Wildernesses, and has been the center for forest industry for over a century, and is the site of the University of Montana School of Forestry and the center of forestry activities of the Montana Department of State Lands; and

WHEREAS, forestry research programs at the University of Montana and elsewhere in the northern Rocky Mountains would likely suffer from the proposed restructuring; and

WHEREAS, the effects of the Forest Service proposal would include the loss of Montana-based decision-making authority over Montana national forests to a geographically remote, ecologically unrelated urban area, as well as the loss of high level, professionally-skilled Forest Service employees to the economic detriment of western Montana; and

MAR-08-1995 08:47

SEC&JUNEAU CHAMBER

907 463 5670 P.02

WHEREAS, the Forest Service has produced no cost-benefit justification for its proposed restructuring nor evidence of how such restructuring would serve taxpayer and public interest; and

WHEREAS, the proposed consolidation of Forest Service activity in the Denver urban area appears to violate the letter and spirit of the Federal Forest and Rangeland Renewable Resources Planning Act, and specifically 19 U.S.C @ 1609, which requires the Forest Service give priority in locating regional offices in rural areas and towns near the national forests to provide the optimum level of convenient, useful services to the public; and

WHEREAS, amid current controversy surrounding forest management activities, there is a broad public recognition of the need for continuing dialogue among all segments of the public and public agencies, including the Forest Service.

NOW, THEREFORE, BE IT RESOLVED BY THE SENATE AND THE HOUSE OF REPRESENTATIVES OF THE STATE OF MONTANA, that the Northern Region Regional Office be retained in Missoula, Montana, and furthermore continue to oversee the management of those National Forests and Grasslands in the Northern Region.

BE IT FURTHER RESOLVED, that the Legislature urges the Montana Congressional delegation's continued strong opposition to any proposed Forest Service restructuring likely to close or reduce the decision-making authority and capability of the Missoula Regional Office.

BE IT FURTHER RESOLVED, that the Department of Agriculture and the Forest Service discontinue implementing the proposed reorganization plan and concentrate their efforts on more direct ways of reducing costs and staffing within the current Forest Service.

BE IT FURTHER RESOLVED, that there be public participation in all Forest Service restructuring decisions to assure that any such restructuring protects Montana and national public and taxpayer interests by requiring (i) an accurate, comprehensive cost-benefit analysis to justify it; (ii) adherence to all laws applicable to the management of our national forest resources; and (iii) Forest Service personnel reductions or relocations resulting from restructuring, if any, be done in a manner leaving the maximum number of decision-making personnel in each Forest Service office at, or near, the national forests those offices oversee.

BE IT FURTHER RESOLVED, that the Montana Legislature supports meaningful federal agency restructuring which will result in continued stewardship of the land, better service to the public, actual taxpayer savings, and less rather than more federal agency centralization.

BE IT FURTHER RESOLVED, that the Secretary of State send copies of this resolution to the Montana Congressional Delegation, the Secretary of Agriculture, the Chief of the Forest Service, and the Regional Forester of the Northern Region.

RE

JOHN A. SANDOR

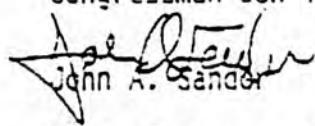
P.O. Box 21135
Juneau, Alaska 99802-1135

January 6, 1995
PHONE: (907) 586-2467
FAX: (907) 586-2490

M E M O R A N D U M

TO: U.S. Senator Ted Stevens (attention Duane Gibson)
U.S. Senator Frank Murkowski (attention Mike Flanagan)
Congressman Don Young (attention Lloyd Jones)

FROM:


John A. Sandor

SUBJECT: New U.S. Forest Service Strategic Plan

Enclosed is a paper: "ACTIONS NEEDED TO CORRECT THE SERIOUS FLAWS IN THE NEW STRATEGIC PLAN FOR THE FOREST SERVICE RECENTLY APPROVED BY USDA SECRETARY ESPY".

This paper was prepared by an ad hoc group of professional resource managers (many retired Forest Service employees) from various parts of the nation who advocate major improvements in the new Strategic Plan for the Forest Service.

We advocate all aspects of this Strategic Plan be put on hold until the new Secretary of Agriculture can review the plan. We also believe the Congress must have oversight of the major changes proposed. It is essential that Governors, State Legislatures and local communities also be partners in the development of any new Strategic Plan for the U.S. Forest Service, which has profound impacts on states and communities who are dependent upon the National Forests. It is imperative that the Forest Service have clearly defined decision-makers within the state who can work with the state, local communities and native corporations/villages, as forest plans are prepared and implemented.

The Northern Rocky Mountain Retirees Association is hosting a meeting on this important issue January 18 in Missoula, Montana. I and others will continue to work closely with this and other regional representatives from different parts of the country. We would like to offer our assistance in providing you and other Members of Congress with whatever information we can to make certain the Strategic Plan finally approved will meet the needs of states and communities dependent on the National Forests.

We are very encouraged by your new leadership roles in Congress.

Thank you.

Enclosure: Paper on the New Forest Service Strategic Plan

cc: Organizations and individuals reviewing the Forest Service Strategic Plan

cc: John Katz, Alaska Governor's Office, Washington, D.C.

PLAN FOR THE FOREST SERVICE RECENTLY APPROVED BY USDA SECRETARY ESPY

In various parts of the nation, Forest Service plans and programs have become embroiled in complex appeals and litigation. Forest management activities have been suspended for years. Communities have suffered from the loss of available timber. In some instances, even the harvest of insect/disease infested stands has been stopped, raising the risk of catastrophic fires from the build-up of fuels in unmanaged forests. People within and outside government have recognized the need to deal with these crises situations adversely impacting states and communities.

In a December 6, 1994 memorandum to Forest Service employees, the Chief of the Forest Service reported that "the strategic plan for creating the Forest Service of the future" was approved by Secretary of Agriculture Espy. This strategic plan is described in a paper titled:

"REINVENTION OF THE
FOREST SERVICE;
The Changes Begin"
December 6, 1994

Surprisingly, this far-reaching "strategic plan" was developed without meaningful involvement of key elected leaders including State Governors/Members of the United States Congress or community and tribal government leaders adversely impacted by the consequences and serious problems stemming from the "changes" that have been approved by Secretary of Agriculture Espy shortly before his resignation. In one specific instance, the Governor of one impacted state, formally requested the opportunity to discuss the rumored organizational changes under consideration as early as August 26, 1994, but was denied that opportunity even as this proposal was being prepared for Secretary Espy's approval. 1/

This failure to consult and work closely with state, community and tribal governments is inconsistent with, if not in contradiction of President Clinton's Executive Order No. 12875 "ENHANCING INTERGOVERNMENTAL PARTNERSHIPS", which was signed by the President on October 26, 1993. 2/

Vice President Gore's "REPORT ON REINVENTING GOVERNMENT" was developed to create "a government that works better and costs less" by "Empowering States and Local Governments" and "Decentralizing Decisionmaking Power". 3/ However, the Forest Service reinvention strategic plan does not empower local governments or include them as true partners. In fact, the strategic plan approved by Secretary Espy eliminates the very foundation of local authority which had the responsibility of working with states, local communities and tribal governments. Regional Foresters, Forest Supervisors and other line officers which were vested with such authorities are being replaced by "leadership teams" of four people. These leadership teams report to counter-part team leaders in Washington, D.C.. Local decisionmaking authorities are thus masked, diffused and withdrawn to Washington, D.C. where only the Chief of the Forest Service and Secretary of Agriculture can truly be held accountable for the policies, decisions and actions of these "leadership teams".

This very fundamental organization change eliminates the local decisionmaking authority and accountability controls that have been in place since the formation of the Forest Service. The USDA Forest Service "THE USE 600K - Regulations and Instructions for the Use of the National Forest Reserves", issued by the Secretary of Agriculture, July 1, 1906 describes in detail these local responsibility and accountability mechanisms. 4/ Gifford Pinchot's 1914 book, "THE TRAINING OF A FORESTER", described the specific responsibilities of these locally empowered administrators. 5/ The withdrawal and diffusion of local decisionmaking authority is already being implemented in some areas of the nation, which is certain to make Forest Service management less responsive to states, local communities and tribal governments.

Page 120-

The newly defined purpose of the Forest Service to promote the sustainability of ecosystems without specifically retaining the traditional Forest Service objective of promoting community stability has already created serious problems and crises for hundreds of communities dependent upon the National, Forest, State and Private forest ecosystems. Communities and the people who live and depend on the forests are an integral part of ecosystems. The failure to adequately involve states, communities and tribal governments as true partners in the Forest Service Reinvention Project can be expected to create additional crises and problems for communities if the Strategic Plan approved by Secretary Espy is implemented in its present form.

The striking example of the flawed scientific basis for the definition of ecosystems and ecological boundaries is illustrated in the proposed realignment of Forest Service Regional Office boundaries. The Strategic Plan states that "Regional boundaries will be realigned to more closely follow natural ecological boundaries..." Incredibly, the strategic plan announces the time-table for incorporating Alaska's diverse and unique forest ecosystems under the direction of a Forest Service "leadership team" headquartered in Portland, Oregon. None of Alaska's forest ecosystems are the same as those represented in the Pacific Northwest. As a matter of fact, many of Alaska's boreal forests are more closely related to the ecosystems of the Northern Lake States and adjacent Canadian provinces. Furthermore, the communities and tribal governments of Alaska are also not representative of any communities in the Pacific Northwest.

The history of the United States Forest Service in Alaska outlines the rationale for the establishment of a separate Alaska District (Region) Office in Alaska seventy five years ago in 1919. 6/ Both the ecological and socio-economic basis for that historic decision was apparently overlooked in the Reinvention Project process. Even more troubling, is the fact that Governor Walter J. Hickel's formal August 26, 1994 letter requesting the opportunity to discuss the proposed consolidation of Alaska under the Portland, Oregon office was also ignored. 7/ This oversight of elected leaders in the Reinvention Project was not an isolated example. United States Senator Max Baucus and other elected leaders from the State of Montana were not provided information explaining the rationale for closing the Missoula, Montana Regional Office. 7/

The failure to adequately consult with members of the U.S. Congress and the elected leaders in state governments may be responsible for the strategic plan's lack of consistency with a number of the principal federal laws that were enacted to guide Forest Service activities. As a result, the "strategic plan" for reorganization falls far short of a comprehensive plan for reorganization of the agency. The U.S. Congress has provided direction, through various laws, for the development of a national renewable resource program which "assures that the Nation maintains a natural resource conservation posture that will meet the requirements of our people in perpetuity..." (Reference: National Forest Management Act of 1976, Section 2 (2) (6)) 8/

This new strategic plan, and a number of policy decisions being applied in various parts of the nation, has seemingly turned away from any commitments toward providing a continuous dependable flow of renewable resources to meet the public needs as directed by the Organic Act, Multiple-Use Sustained Yield Act of 1960, the NMFA and other Acts of Congress. Under the Forest Service's new direction, the agency is more inclined to present a rather nebulous plan for ecosystem management where resource yields, if any, are simply by products of management with no predictable flows or commitment to supply levels to sustain human life. 8/

If this apparent shift from the objectives outlined in the Forest Service's basic statutes was purposefully incorporated into the new strategic plan, then the mission of the Forest Service and the purposes of the National Forest needs review and re-examination by the Congress before the agency drifts to its own determination of what is best for the Nation.

What can be the point of a major reorganization of the Forest Service without close direction from the Congress as to mission and purpose for these public lands?

The strategic plan's shift to a centralization of authority, removing the opportunity for meaningful participation in resource management decisions by state and local interests is also not consistent with the agency's statutes, the President's E.O. 12875 or the Secretary of Agriculture's direction to increase the contacts and opportunities for local participation in the agency's activities. The U.S. Congress must surely have the opportunity to determine if such centralization is appropriate for the management of these public lands.

The practicability of implementation of this major reorganization and shift of objectives raises serious doubts as to whether the agency will be effective during the period of reorganization and removal of regional, state and forest-level decision-making authorities and accountability mechanisms. The strategic plan provides no insight as to how such major changes could take place with the "engine still running" to meet the needs of communities and people dependent on the forests. This could result in a protracted period when all available agency energies are directed internally while resource management and production to meet the nation's needs are neglected.

The above are a few examples of the expanding crises and problems stemming from the Forest Service's apparent shift away from its traditional commitment to community stability. The Strategic Plan approved by Secretary Espy will further weaken that commitment. These developments have led to a sharp decline in the morale of professional foresters and other resource managers, technicians and staff who have devoted their lives to the management of forest ecosystems in a true partnership with communities dependent upon the National Forests.

The failure to adequately involve Members of Congress, states, communities and tribal governments in the development of the Reinvention Project's Strategic Plan has led to a loss of trust in the Department of Agriculture's leadership. To help restore this trust, the following action program is suggested.

1. The newly designated Secretary of Agriculture should be asked to review and reconsider the Strategic Plan approved by Secretary Espy last month. The U.S. Congress must have an opportunity to review the plan's conformance to the agency's statutes and other Congressional direction before implementation.
2. The USDA/Forest Service should conduct true partnership meetings with States, communities and tribal governments and jointly develop a new Strategic Plan.
3. The USDA/Forest Service, through this partnership, should identify and implement strategies for "Decentralizing Decisionmaking" and "Empowering States and Local Governments" to more effectively manage forest ecosystems to assure community stability, improved service to the public and a reduction in government costs.

Finally, a Forest Service with state and community-based decisionmaking authority in partnership with empowered state and local governments, will work better and cost much less than that projected in the new Strategic Plan approved by Secretary Espy. Forest management models in various parts of the nation already protect the environment, improve forest health, reduce the risk of catastrophic fires and sustain the communities dependent upon those forests. 9/ The Forest Service must move forward with these objectives, and not be paralyzed by the consequences noted above.

1. Governor Walter J. Hickel's August 26, 1994 letter to Vice President Al Gore opposing the option of merging the Alaska Region of the Forest Service with the Portland, Oregon Regional Office; looks forward to discussing the proposal.
2. President Clinton's Executive Order No. 12875, dated October 26, 1993, titled: "ENHANCING INTERGOVERNMENTAL PARTNERSHIPS"
3. Vice President Al Gore "THE GORE REPORT ON REINVENTING GOVERNMENT";
page 35: "Empowering State and Local Governments"
page 69: "Decentralizing Decisionmaking Power"
September 7, 1993 Times Books Edition, Random House, Inc. 168pp
4. James Wilson, Secretary of Agriculture, "THE USE BOOK - Regulations and Instructions for the Use National Forest Reserves"
Issued by the Secretary of Agriculture, July 1, 1906
The U.S. Government Printing Office, Washington, D.C. 208pp
5. Gifford Pinchot, "THE TRAINING OF A FORESTER" by the first Chief of the USDA Forest Service; Pages 46-50 describes the responsibilities of the Forest Supervisor and related line positions which are responsible for the "protection, use and care" of the National Forests.
J. 8. Lippincott Company, Philadelphia and London; 149pp
6. Lawrence W. Rakestraw, "A HISTORY OF THE UNITED STATES FOREST SERVICE IN ALASKA" - A cooperative publication of the Alaska Historical Commission, Department of Education, State of Alaska; and the Alaska Region, United States Forest Service, Department of Agriculture with the assistance of the Alaska Historical Society. Anchorage, Alaska 1981 221pp
(Chapter 5, pages 83-116 includes a discussion of the establishment of the Alaska District (Region) Office in 1919)
7. U.S. Senator Max Baucus' December 9, 1994 letter to Under Secretary of Agriculture James Lyons noting the unfortunate lack of information provided by the USDA explaining the rationale for the proposed actions. A listing of 18 questions regarding the Reinvention Project was sent to Mr. Lyons.
8. USDA Forest Service Handbook No. 453, "THE PRINCIPAL LAWS RELATING TO FOREST SERVICE ACTIVITIES"
U.S. Government Printing Office, Washington, D.C. 591pp
9. Effective forest management models are available in most regions of the nation. New models are also in development, such as those represented by the Sierra-Nevada Ecosystem Studies and the Plumas-Lassen National Forest management proposal.
- * NOTE: This draft paper (1/6/95) has been prepared by an ad hoc group of professional resource managers and public administrators (mostly retired U.S. Forest Service employees) from various parts of the nation who advocate major improvements in the new Strategic Plan for the Forest Service, approved by USDA Secretary Espy.

cannot
case in
power-
ficers to
ment in
stitutional
homes,
that of-
rious to

ter of fact
entionally
reason the
2. supra.

al search
d by, and
ra.

(495 US 33)
MISSOURI, et al., Petitioner

v

KALIMA JENKINS et al.

495 US 33, 109 L Ed 2d 31, 110 S Ct 1651

[No. 88-1150]

Argued October 30, 1989. Decided April 18, 1990.

Decision: Federal District Court held (1) to have abused discretion in directly imposing property tax increase to fund desegregation remedy, but (2) to have authority to order Missouri school district to levy such taxes.

SUMMARY

The Kansas City, Missouri, School District (KCMSD) and a group of KCMSD students filed a complaint based on 42 USCS § 1983 in the United States District Court for the Western District of Missouri. The complaint alleged that several defendants, including the state of Missouri, had operated a racially segregated public school system in the Kansas City area. In a series of decisions, the District Court (1) realigned the KCMSD as a party defendant; (2) found that the KCMSD and the state had operated a segregated school system within the KCMSD; and (3) issued an order as to (a) the remedies deemed necessary to eliminate the vestiges of segregation, and (b) the financing deemed necessary to implement those remedies. While the finding of liability was eventually upheld, further litigation ensued on other matters, including the appropriate remedy and its financing—litigation which was complicated by alleged problems concerning the limits, under several state constitutional and statutory provisions, on the KCMSD's authority to tax. As the proceedings continued and as the District Court endorsed, as part of its desegregation remedy, a multimillion-dollar expansion of a magnet-school program, the District Court eventually, in 1987, (1) concluded that the KCMSD had exhausted all available means of raising additional revenue to pay for the KCMSD's share of the cost of the remedy; and (2) among other decisions, exercised what the court called its broad equitable powers and ordered the KCMSD property tax levy raised—regardless of any state-law limits—from \$2.05 to \$4.00 per \$100 of assessed valuation through the 1991-1992 fiscal year (672 F Supp 400). On appeal, the United States Court of

Briefs of Counsel, p 806, *infra*.

Appeals for the Eighth Circuit, in affirming in part and reversing in part on August 19, 1988, (1) upheld the scope of the desegregation order and the District Court's allocation of costs; (2) said that state-law limitations which prevented the KCMSD from raising funds sufficient to implement the desegregation remedy had to fall to the command of the Federal Constitution; and (3) affirmed the actions that the District Court had taken to that point with respect to the property tax increase; but (4) ruled that, under the principles of federal-state comity, the District Court, in the future, should not set the property tax rate itself, but should (a) authorize the KCMSD to submit to the state tax collection authorities a levy adequate to fund the KCMSD's budget, and (b) enjoin the operation of state laws that would limit or reduce the levy below that amount (855 F2d 1295). Under 28 USCS § 2101(c), a petition for certiorari in a civil case must be filed within 90 days after the entry of the judgment below. The state's petition for certiorari was filed within 90 days after an October 14, 1988 denial of rehearing by the Court of Appeals. The United States Supreme Court (1) granted the state's petition, limited to the question as to the property tax increase, but (2) requested the parties to address whether the petition was timely filed (490 US 1034, 104 L Ed 2d 402, 109 S Ct 1930).

On certiorari, the Supreme Court affirmed the judgment of the Court of Appeals insofar as it required the District Court to modify its funding order, reversed the judgment of the Court of Appeals insofar as it allowed the tax increase imposed by the District Court to stand, and remanded the case for further proceedings. In an opinion by WHITE, J., expressing the unanimous view of the court as to holding 1 below, and joined by BRENNAN, MARSHALL, BLACKMUN, and STEVENS, JJ., as to holdings 2-4 below, it was held that (1) the state's petition for certiorari was timely filed; (2) the District Court abused its equitable discretion in imposing the property tax increase itself, because, (a) under the principles of comity, the District Court, before taking such a drastic step, was obliged to assure itself that no permissible alternative would have accomplished the required task, and (b) the alternative means existed of (i) authorizing or requiring the KCMSD to levy property taxes at a rate adequate to fund the remedy, and (ii) enjoining the operation of state laws that would have prevented the KCMSD from exercising such a power; (3) the difference between the two approaches was more than a matter of form; and (4) accepting for purposes of decision, as a result of the limited grant of certiorari, the Court of Appeals' conclusion that the District Court's desegregation remedy was proper, the equitable and constitutional principles governing the District Court's power with respect to financing the remedy were satisfied by the Court of Appeals' modifications as to what the District Court should do in the future, because (a) even though it is claimed that the alleged excessiveness of the remedy causes such funding to violate the principles of equity and comity, such an argument is aimed at the scope of the remedy, rather than the manner in which the remedy is to be funded, (b) under the circumstances, it was not an abuse of discretion for the District Court to rule that the KCMSD would be liable for funding its share of the cost of the remedy, instead of shifting any funding in excess of the state-law limits to the jointly liable

MISSOURI v JENKINS

(1990) 495 US 33, 109 L Ed 2d 31, 110 S Ct 1651

state, (c) the KCMSD's obligation to fund the desegregation remedy arose from its operation of a segregated school system in violation of the Federal Constitution, (d) the Constitution's Tenth Amendment reservation of nondelegated powers to the states is not implicated by a federal-court judgment enforcing the express prohibitions against unlawful state conduct enacted by the Constitution's Fourteenth Amendment, (e) a court order directing a local government body to levy its own taxes is a judicial act within the power of a federal court, under Article III of the Constitution, and (f) under the Constitution's supremacy clause (Art VI, cl 2), the KCMSD may be ordered to levy taxes, despite the state-law limitations, in order to compel the discharge of an obligation imposed on the school district by the Fourteenth Amendment.

KENNEDY, J., joined by REHNQUIST, Ch. J., and O'CONNOR and SCALIA, JJ., concurring in part and concurring in the judgment, expressed the view that (1) the Supreme Court had jurisdiction to decide the case; and (2) the District Court had exceeded its authority by attempting to impose a tax; but (3) any purported distinction between the direct imposition of a tax by a federal court and an order commanding the KCMSD to impose the tax was but a convenient formalism, where the court's opinion was predicated on elimination of state-law limitations on the KCMSD's taxing authority; (4) a federal court is without power to order a tax levy that goes beyond the taxing power granted by state law to a local authority, where the state-law limitation was not a subsequent enactment itself in violation of the Federal Constitution's clause against impairing the obligation of contracts (Art I, § 10, cl 1); (5) even if a federal court might in some extreme case authorize such taxation, the case at hand was not such a case, where, even though the limited grant of certiorari required an assumption that the District Court's choice of an expensive magnet-school remedy was a permissible exercise of discretion, (a) a taxation order ought not to be considered unless there has been a finding that, without the particular remedy at issue, the constitutional violation would go unremedied, and (b) there was no such showing in the record of the case at hand; and (6) the Supreme Court's opinion, by broad dictum, embraced an expansion of judicial power beyond all precedent.

October 27, 1987, order increasing property taxes in the KCMSD through the end of fiscal year 1991-1992. The District Court's January 3, 1989, order does not support, but refutes, the Court's characterization. The District Court rejected a request by the KCMSD to increase the property tax rate using the method endorsed by the Eighth Circuit from \$4.00 to \$4.23 per \$100 of assessed valuation. The District Court reasoned that an increase in 1988 property taxes would be difficult to administer and cause resentment among taxpayers, and that an increase in 1989 property taxes would be premature because it was not yet known whether an increase would be necessary to fund expenditures. App 511-512. In rejecting the KCMSD's request, the District Court left in effect the \$4 rate it had established in its October 27, 1987, order.

Whatever the Court thinks of the Court of Appeals' opinion, the District Court on remand appears to have thought it was under no compulsion to disturb its existing order establishing the \$4 property tax rate through fiscal year 1991-1992 unless and until it became necessary to raise property taxes even higher. The Court's discussion today, and its stated approval of the "method for future funding" found "preferable" by the Court of Appeals, is unnecessary for the decision in this case. As the Court chooses to discuss the question of future taxation, however, I must state my respectful disagreement with its analysis and conclusions on this vital question.

The premise of the Court's analysis, I submit, is infirm. Any purported distinction between direct imposition of a tax

[495 US 64]

by the federal court and an order commanding the school district

to impose the tax is but a convenient formalism where the court's action is predicated on elimination of state-law limitations on the school district's taxing authority. As the Court describes it, the local KCMSD possesses plenary taxing powers, which allow it to impose any tax it chooses if not "hinder[ed]" by the Missouri Constitution and state statutes. Ante, at 57, 109 L Ed 2d, at 58. This puts the conclusion before the premise. Local government bodies in Missouri, as elsewhere, must derive their power from a sovereign, and that sovereign is the State of Missouri. See Mo Const, Art X, § 1 (political subdivisions may exercise only "[tax] power granted to them" by Missouri General Assembly). Under Missouri law, the KCMSD has power to impose a limited property tax levy up to \$1.25 per \$100 of assessed value. The power to exact a higher rate of property tax remains with the people, a majority of whom must agree to empower the KCMSD to increase the levy up to \$3.75 per \$100, and two-thirds of whom must agree for the levy to go higher. See Mo Const, Art X, §§ 11(b), (c). The Missouri Constitution states that "[p]roperty taxes and other local taxes . . . may not be increased above the limitations specified herein without direct voter approval as provided by this constitution." Mo Const, Art X, § 16.

For this reason, I reject the artificial suggestion that the District Court may, by "prevent[ing] . . . officials from applying state law that would interfere with the willing levy of property taxes by KCMSD," ante, at 56, n 20, 109 L Ed 2d, at 7, cause the KCMSD to exercise power under state law. State laws, includ-

MISSOURI v JENKINS

(1990) 495 US 33, 109 L Ed 2d 31, 110 S Ct 1651

ing taxation provisions legitimate and constitutional in themselves, define the power of the KCMSD. Cf. *Washington v Washington Commercial Passenger Fishing Vessel Assn.*, 443 US 658, 695, 61 L Ed 2d 823, 99 S Ct 3055 (1979) (whether a state agency "may be ordered actually to promulgate regulations having effect as a matter of state law may well be doubtful"). Absent a change in state law, no increase in property taxes could take

[495 US 65]

place in the KCMSD without a federal court order. It makes no difference that the KCMSD stands "ready, willing, and . . . able" to impose a tax not authorized by state law. Ante, at 51, 109 L Ed 2d, at 54. Whatever taxing power the KCMSD may exercise outside the boundaries of state law would derive from the federal court. The Court never confronts the judicial authority to issue an order for this purpose. Absent a change in state law, the tax is imposed by federal authority under a federal decree. The question is whether a district court possesses a power to tax under federal law, either directly or through delegation to the KCMSD.

II

Article III of the Constitution states that "[t]he judicial Power of the United States, shall be vested in one Supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." The description of the judicial power nowhere includes the word "tax" or anything that resembles it. This reflects the Framers' understanding that taxation was not a proper area for judicial involvement. "The judiciary . . . has no influence over either the sword or the purse, no direction

either of the strength or of the wealth of the society, and can take no active resolution whatever." *The Federalist* No. 78, p 523 (J. Cooke ed 1961) (A. Hamilton).

Our cases throughout the years leave no doubt that taxation is not a judicial function. Last Term we rejected the invitation to cure an unconstitutional tax scheme by broadening the class of those taxed. We said that such a remedy "could be construed as the direct imposition of a state tax, a remedy beyond the power of a federal court." *Davis v Michigan Dept. of Treasury*, 489 US 803, 818, 103 L Ed 2d 891, 109 S Ct 1500 (1989). Our statement in *Davis* rested on the explicit holding in *Moses Lake Homes, Inc. v Grant County*, 365 US 744, 6 L Ed 2d 66, 81 S Ct 870 (1961), in which we reversed a judgment directing a District Court to decree a valid tax in place of an invalid one that the State had attempted to enforce:

[495 US 66]

"The effect of the Court's remand was to direct the District Court to decree a valid tax for the invalid one which the State had attempted to exact. The District Court has no power so to decree. Federal courts may not assess or levy taxes. Only the appropriate taxing officials of Grant County may assess and levy taxes on these leaseholds, and the federal courts may determine, within their jurisdiction, only whether the tax levied by those officials is or is not a valid one." *Id.*, at 752, 6 L Ed 2d 66, 81 S Ct 870.

The nature of the District Court's order here reveals that it is not a proper exercise of the judicial power. The exercise of judicial power involves adjudication of controversies

and imposition of burdens on those who are parties before the Court. The order at issue here is not of this character. It binds the broad class of all KCMSD taxpayers. It has the purpose and direct effect of extracting money from persons who have had no presence or representation in the suit. For this reason, the District Court's direct order imposing a tax was more than an abuse of discretion, for any attempt to collect the taxes from the citizens would have been a blatant denial of due process.

Taxation by a legislature raises no due process concerns, for the citizens' "rights are protected in the only way that they can be in a complex society, by their power, immediate or remote, over those who make the rule." *Bi-Metallic Co. v Colorado State Bd. of Equalization*, 239 US 441, 445, 60 L Ed 372, 36 S Ct 141 (1915). The citizens who are taxed are given notice and a hearing through their representatives, whose power is a direct manifestation of the citizens' consent. A true exercise of judicial power provides due process of another sort. Where money is extracted from parties by a court's judgment, the adjudication itself provides the notice and opportunity to be heard that due process demands before a citizen may be deprived of property.

The order here provides neither of these protections. Where a tax is imposed by a governmental body other than

[495 US 67]

the legislature, even an administrative agency to which the legislature has delegated taxing authority, due process requires notice to the citizens to be taxed and some opportunity to be heard. See, e.g., *Londoner v Denver*, 210 US 373, 385-386, 52 L Ed 1103, 28 S Ct 708 (1908). The

citizens whose tax bills would have been doubled under the District Court's direct tax order would not have had these protections. The taxes were imposed by a District Court that was not "representative" in any sense, and the individual citizens of the KCMSD whose property (they later learned) was at stake were neither served with process nor heard in court. The method of taxation endorsed by today's dicta suffers the same flaw, for a district court order that overrides the citizens' state-law protection against taxation without referendum approval can in no sense provide representational due process. No one suggests the KCMSD taxpayers are parties.

A judicial taxation order is but an attempt to exercise a power that always has been thought legislative in nature. The location of the federal taxing power sheds light on today's attempt to approve judicial taxation at the local level. Article I, § 1, states that "[a]ll legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives." (Emphasis added.) The list of legislative powers in Article I, § 8, cl 1, begins with the statement that "[t]he Congress shall have Power To lay and collect Taxes. . . ." As we have said, "[t]axation is a legislative function, and Congress . . . is the sole organ for levying taxes." *National Cable Television Assn., Inc. v United States*, 415 US 336, 340, 39 L Ed 2d 370, 94 S Ct 1146 (1974) (citing Article I, § 8, cl 1).

True, today's case is not an instance of one branch of the Federal Government invading the province of another. It is instead one that brings the weight of federal "author-

MISSOURI v JENKINS

(1990) 495 US 33, 109 L Ed 2d 31, 110 S Ct 1651

ity upon a local government and a State. This does not detract, however, from the fundamental point that the Judiciary is not free to exercise all federal power; it may exercise only the

[495 US 68]

judicial power. And the important effects of the taxation order discussed here raise additional federalism concerns that counsel against the Court's analysis.

In perhaps the leading case concerning desegregation remedies, *Milliken v Bradley*, 433 US 267, 53 L Ed 2d 745, 97 S Ct 2749 (1977), we upheld a prospective remedial plan, not a "money judgment," ante, at 54, 109 L Ed 2d, at 56, against a State's claim that principles of federalism had been ignored in the plan's implementation. In so doing the Court emphasized that the District Court had "neither attempted to restructure local governmental entities nor to mandate a particular method or structure of state or local financing." 433 US, at 291, 53 L Ed 2d 745, 97 S Ct 2749. No such assurances emerge from today's decision, which endorses federal-court intrusion into these precise matters. Our statement in a case decided more than 100 years ago should apply here.

"This power to impose burdens and raise money is the highest attribute of sovereignty, and is exercised, first, to raise money for public purposes only; and, second, by the power of legislative authority only. It is a power that has not been extended to the judiciary. Especially is it beyond the power of the Federal judiciary to assume the place of a State in the exercise of this authority at once so delicate and so important." *Rees v City of Watertown*, 19 Wall 107, 116-117, 22 L Ed 72 (1874).

The confinement of taxation to the legislative branches, both in our Federal and State Governments, was not random. It reflected our ideal that the power of taxation must be under the control of those who are taxed. This truth animated all our colonial and revolutionary history.

"Your Memorialists conceive it to be a fundamental Principle . . . without which Freedom can no Where exist, that the People are not subject to any Taxes but such as are laid on them by their own Consent, or by those who are legally appointed to represent them: Property must become too precarious for the Genius of a free People

[495 US 69]

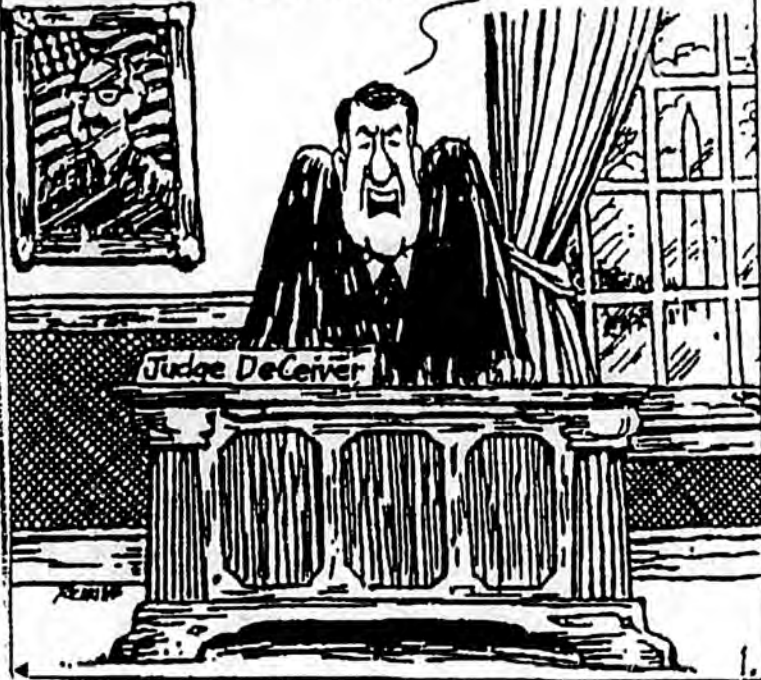
which can be taken from them at the Will of others, who cannot know what Taxes such people can bear, or the easiest Mode of raising them; and who are not under that Restraint, which is the greatest Security against a burdensome Taxation, when the Representatives themselves must be affected by every tax imposed on the People." *Virginia Petitions to King and Parliament*, December 18, 1764, reprinted in *The Stamp Act Crisis* 41 (E. Morgan ed 1952).

The power of taxation is one that the Federal Judiciary does not possess. In our system "the legislative department alone has access to the pockets of the people," *The Federalist* No. 48, p 334 (J. Cooke ed 1961) (J. Madison), for it is the Legislature that is accountable to them and represents their will. The authority that would levy the tax at issue here shares none of these qualities. Our Federal Judiciary, by design, is not representative or responsible to the people in a political sense; it is independent. Federal judges do not depend on the popular will for their

Judge DeCeiver

Interpreting The Constitution

PEOPLE CAN'T POSSIBLY UNDERSTAND THE LEGAL NECESSITIES CREATED BY OUR FAST CHANGING LIFE.



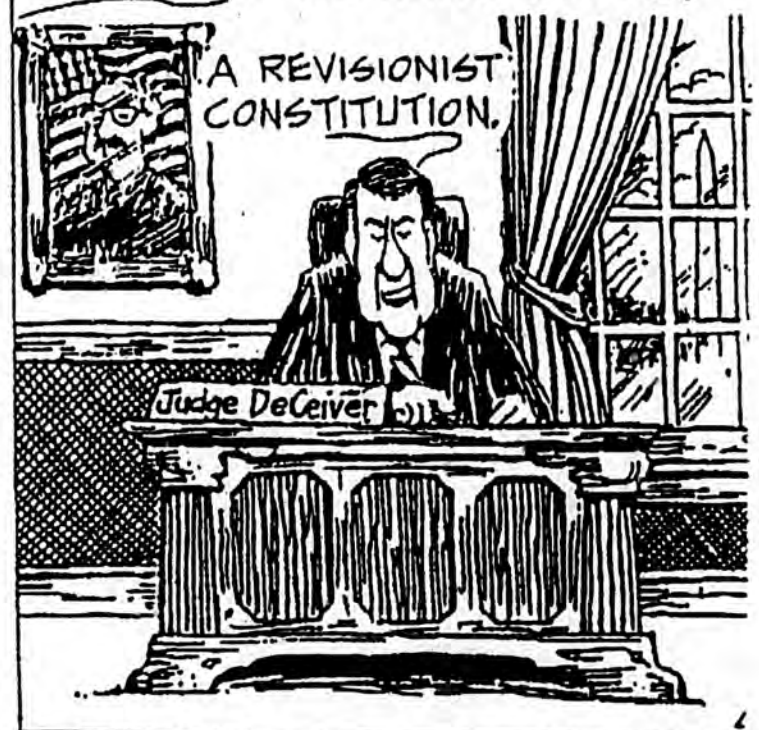
THAT'S WHY THEY NEED SOMEONE LIKE ME TO DIRECT THEM THROUGH LIFE'S MAZE.



BUT TO DO THIS LAWS MUST BE RE-INTERPRETED. A NEW VIEW OF HISTORY AND TAXATION IS IMPERATIVE IF PEOPLE ARE TO ACCEPT TODAY THAT WHICH WAS ONCE INTOLERABLE.



SO, WHAT ARE YOU WRITING JUDGE?



State of Tennessee



THE SENATE

SENATE JOINT RESOLUTION NO. 373

By Senators Atchley, Patten, Koella, Albright, Burks, Cooper, Crowe, Crutchfield, Elsea, Gilbert, Greer, Hamilton, Harper, Haynes, Henry, Holcomb, Jordan, Kyle, Leatherwood, McKnight, McNally, O'Brien, Person, Rice, Rochelle, Springer, Wallace, Womack, Wright,
Mr. Speaker Wilder

and
Representatives Peroulas Draper, Buck

A RESOLUTION Memorializing the U.S. Congress to propose and submit to the several states an amendment to the Constitution of the United States providing that no court shall have the power to levy or increase taxes.

WHEREAS, In a five-to-four decision on April 18, 1980, the United States Supreme Court extended the power of the judicial branch of government beyond any defensible bounds; and

WHEREAS, In Missouri v. Jenkins (110 Sup. Ct. 1651 (1990)), the U.S. Supreme Court held that a federal court had the power to order an increase in state and local taxes; and

WHEREAS, This unprecedented decision violates the fundamental tenet of separation of powers: the federal judiciary, who serve for life and who are answerable to no one, should not have control over the power of the purse; and

WHEREAS, In response to this decision, several members of Congress have introduced a constitutional amendment to re-establish a principle that has been well-settled: Judges do not have the power to tax; and

WHEREAS, The passage of such constitutional amendment (first by a two-thirds (2/3) majority in both houses of Congress and then by three-fourths (3/4) of the several states' legislatures or conventions) would serve not only to reverse an unfortunate decision, but also to reassert the legislature's constitutional role in maintaining a strong tripartite system of government, a system in which each of the branches is constrained by the others; and

WHEREAS, Such proposed constitutional amendment is a long overdue response to a federal judiciary that, in the pursuit of seemingly good ends, fails to recognize the constitutional limits on its power; and

WHEREAS, In addition to being introduced in the U.S. Congress such constitutional amendment has also been proposed by several states; and

WHEREAS, The text of such proposed constitutional amendment reads: "Neither the Supreme Court nor any inferior court of the United States shall have the power to instruct or order a state or political subdivision, to levy or increase taxes"; and

WHEREAS, Such amendment seeks properly to prevent federal courts from levying or increasing taxes without representation of the people and against the people's wishes; now, therefore,

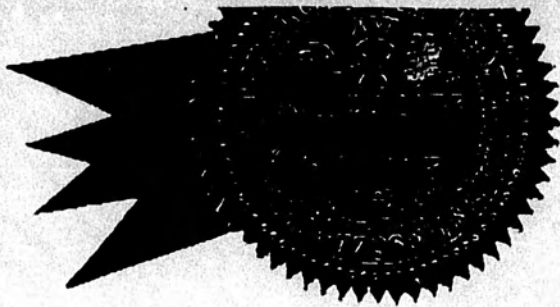
BE IT RESOLVED BY THE SENATE OF THE NINETY-EIGHTH GENERAL ASSEMBLY OF THE STATE OF TENNESSEE, THE HOUSE OF REPRESENTATIVES CONCURRING, That this General Assembly hereby memorializes the U.S. Congress to propose and submit to the several states for ratification no later than January 1, 1995, an amendment to the Constitution of the United States, the text of which amendment shall read:

"Neither the Supreme Court nor any inferior court of the United States shall have the power to instruct or order a state or political subdivision thereof, or an official of such state or political subdivision, to levy or increase taxes."

BE IT FURTHER RESOLVED, That this Body calls upon each Tennessean serving in the U.S. Senate and the U.S. House of Representatives to utilize immediately the full measure of his or her resources and influence in order to ensure the passage of such amendment to the Constitution of the United States, which provides that no court shall have the power to levy or increase taxes.

BE IT FURTHER RESOLVED, That this General Assembly also proposes that the legislatures of each of the several states comprising the United States which have not yet made similar requests apply to the U.S. Congress requesting enactment of such amendment to the United States Constitution.

BE IT FURTHER RESOLVED, That the Chief Clerk of the Senate is directed to transmit enrolled copies of this resolution to the Secretary of State and to the presiding officer and minority party leader in each house of the legislature of the several states comprising the Union; the Speaker and the Clerk of the U.S. House of Representatives; the President and the Secretary of the U.S. Senate; and to each member of the Tennessee delegation to the U.S. Congress.



3

John H. H. H.
SPEAKER OF THE SENATE

Johnny H. H.
SPEAKER OF THE HOUSE OF REPRESENTATIVES

Al M. H.
GOVERNOR



RECEIVED

FEB 14 1994

Ans'd.....

BILL SKAGGS

February 8, 1994

Honorable Ramona Barnes
Speaker of the House
State Capitol Building
Juneau, Alaska 99801

Dear Representative Barnes:

As you know, Missouri House and Senate passed a concurrent resolution petitioning Congress to propose ratification by the legislators of three-fourths of the state to restrict the Supreme Court or any inferior court of the United States to levy or increase taxes.

Not every state has begun their regular legislative session, but for those of us who have, it's a busy and exciting time.

Twenty-six states have responded to our call to propose a change in our federal constitution which reads:

"Neither the Supreme Court nor any inferior court of the United States shall have the power to instruct or order a state or political subdivision thereof, or an official of such state or political subdivision, to levy or increase taxes."

Federal mandates under the Clean Air Act are just one example of an ongoing and growing squeeze being placed upon the states by the federal government. These mandates have caused fear, anger and resentment among our citizens and our commercial and industrial community. Mandates, dictated by Washington, are putting additional strains on an already tight state budget.

Page 2

To further compound this assault on state revenues the federal district court, with the blessing of the United States Supreme Court, continues to order property tax increases "ad infinitum" to correct what Supreme Court Justice Kennedy rightly referred to as an issue which is properly "part of a legitimate political debate over . . . spending priorities" and not a Constitutional command. In his dissenting opinion to this usurpation of legislative authority by the federal courts Justice Kennedy noted, "This . . . begins a process that over time could threaten the fundamental alteration of the form of government our Constitution embodies."

The Constitution does not allow, nor do we need, judicial intervention requiring tax increases as solutions to potentially serious problems.

You're busy, I know, but in order to be of help to all those working for passage of a concurrent resolution, we are asking you to send us an update of your progress. Just return the enclosed questionnaire at your earliest convenience.

Sincerely,


Bill Skaggs

BS:ya

Enclosure

The Madison Forum

17 East Glenwood Lane - St. Louis, Missouri 63122

February 8, 1994

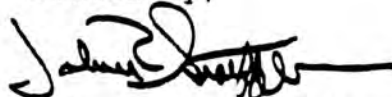
Mandates! Directives! That's all we seem to hear from our federal brethren in Washington, D.C. States have recognized the burden these mandates and directives have created at the state level. Unlike the feds the states can't print money to cover their debts. Patrick Henry put it this way, "(Y)our rich, smug, fine, fat, federal officers - the number of collectors of taxes and excises - will outnumber anything from the states. Who can cope with the excise man and the tax man?"

But when an order to levy taxes is mandated by a federal court, how are you to respond to such an order? How do states begin to question or even reject the orders of the federal courts when even the United States Supreme Court upholds as constitutional a lower federal court order to levy a direct tax increase upon the citizens of a city? How do you respond to what we believe is a violation of not only the Constitution of that state, but as we also believe the Constitution of the United States?

With this in mind Missouri State Senator Walt Mueller and I visited a federal judge in his office, and in the capacity of an elected state official and as a private citizen posed that very question. We were notified that such action was part of an ongoing case and as such, he would not discuss it. We were then directed to leave. This action by the judge was not unexpected, but it was felt that his orders needed to be questioned. We felt it was a legitimate question to pose inasmuch as the Constitution of the United States is quite clear in that the judiciary has never been granted the power to tax.

When a federal judge claims that he cannot discuss judicial directives which violate the constitution of a state with a member of the legislative branch of government, something is drastically wrong. So what does one do when the judiciary mandates direct taxes and Congress refuses to challenge the federal court's usurpation of Article I powers as they pertain to taxation? Our answer is to rein in the power that the judiciary has usurped by asking other states to join our call for an amendment to the Constitution that will put a stop to this judicial grab for power. Action must be taken now. We need your help and active support of this proposed amendment.

Sincerely,



John R. Stoeffler
Chairman, The Madison Forum

The Madison Forum

17 East Glenwood Lane - St. Louis, Missouri 63122

March 1995

As each of you consider our request to join the growing number of states which are calling upon Congress to submit to the states an amendment to the United States Constitution that would limit the power of the federal judiciary to levy or increase taxes, we ask you to consider the implications of federal court intervention in state budgets should a balanced budget amendment become a reality. A number of individuals have.

Former United States Senator John C. Danforth stated in February of 1994, "A balanced-budget amendment would be a disaster if federal courts were able to increase taxes or cut spending."

United States Senator Paul Simon stated these same concerns as early as 1992 when he noted that the Supreme Court could issue a court order requiring Congress to bring the budget into balance. "I don't think that will happen in the immediate future. I'm not sure but that 30 or 40 years from now the court might not be in a position to order Congress to comply." Suppose the courts themselves did in fact become the agents of enforcement.

Judge Robert H. Bork did not feel that such an initiative is impossible. Judge Bork cited *Missouri vs. Jenkins* which affirmed the power of the court to oversee fiscal policy calling such actions "a dismal prospect."

United States Senator Robert Byrd shared his concern over the potential for federal court mischief in determining fiscal policy. "It would . . . bring the judicial branch into the equation, and to that extent our representative democracy would become less of a representative democracy."

Syndicated columnist James J. Kilpatrick stated his concern over the federal courts propensity to usurp Congress' power of the purse. "In recent years federal judges have not hesitated to order states and localities to raise taxes in order to carry out judicial decrees. Judges have turned themselves into school superintendents, prison wardens and state legislatures. Who or what would restrain them in the matter of declaring ways to achieve a balanced budget? My own distrust is massive."

Former United States Senator Tom Eagleton stated in a commentary which appeared in the St. Louis Post Dispatch on February 2, 1994 "The proposed (balanced budget amendment) means either too much or too little -- take your pick. Only the

Page 3
March 1995

area of mandated taxation which we believe will inevitably become a widespread reality.

Let us at the state level show the leadership needed by calling upon the Congress to submit to the states for consideration an amendment that would limit the power of the federal courts from levying or increasing taxes. It is the right thing to do. The time to act is now!

Sincerely,



Walter H. Mueller, Jr.
Walter H. Mueller, Jr.
Missouri State Senator
REPUBLICAN



Bill Skaggs
Bill Skaggs
Missouri State Representative
DEMOCRAT

Enclosures

The Case For A Constitutional Amendment To Limit The Power To Tax Which Has Been Assumed By The Federal Courts

By John R. Stoeffler

Alexander Bickel in his book *The Least Dangerous Branch* makes the following observation regarding those who embrace what he calls the utility of benevolent illusions and the justification for creating them. Such individuals, he wrote, believe that, "The people of a democracy must be mercifully soothed when they find themselves ruled, to whatever extent, by the nine (justices) of the Supreme Court. (They) know what the people imagine. (The people) imagine that they rule themselves, and they imagine *Marbury v. Madison*. To the extent that this is not so, some explanation perhaps may be found or even made up. It would be no sin. It has been done before.

"But", Mr. Bickel notes, "this is very dangerous. What is even more ominous, (is) the illusion (thus created) may engulf its maker and breed, as it has occasionally done, (a) free-ranging "activist" government by the judiciary. Such government is incompatible on principle with democratic institutions." I.

The United States Supreme Court and other federal courts do in fact pose a threat to representative government. All too often their rulings and decrees are attempts at judicial illusion; and all too often they succeed. Rulings and decrees from the courts today seem more often to reflect the social, economic and moral views of what the editorial board of the *St. Louis Post Dispatch* and the American Civil Liberties Union believe America should be than the unequivocal and uncompromising guidelines for a democratic republic which were clearly spelled out by the founding fathers in the United States Constitution. Such rulings and decrees only enhance the political power of the courts while diminishing those of the people through their duly elected representatives in the legislative branch of government.

As I see it there are three sources of power which control government; these are the power to legislate, the power of the sword and the

power of the purse. These are **political powers**. In any democratically elected government these political powers must remain in the hands of that branch closest to the people, the legislative branch of government, if representative government is to survive.

In addressing the Missouri General Assembly in 1982 Robert T. Donnelly, then Chief Justice stated, "I profoundly respect the United States Supreme Court as an institution. However, even the United States Supreme Court should not be permitted to wield power it was never given. The greed for power has surfaced from time-to-time in all civilizations. The uniqueness of our present concern is that the disease has cropped out among the judges, where one would least expect it." 2. This power grab, if left unchallenged, can only lead to a substantial lessening of those ties which bind our republican form of government, and the potential for the establishment of a judicial oligarchy which, despite any assurances to the contrary, will be anything but benign.

I stated earlier that there are three sources of **political power** which I believe control government; and while the subject of my talk deals with the power to tax which the federal courts have seized and what action needs to be done to address it, I feel it is also necessary to discuss ways in which the judiciary has reached into those two other areas of legislative power to support my contention that a pattern of judicial activism and usurpation is not only alive, but a real and growing threat to representative government.

First let me discuss the usurpation of legislative power by the federal judiciary.

In 1717 Bishop Hoadly stated, "(W)hoever hath an absolute authority to interpret any written or spoken laws it is he who is truly the lawgiver, to all intents and purposes, and not the person who first wrote them." 3. Today, the federal judiciary has taken upon itself the power to legislate by interpretation. Justice Holmes noted this in his 1930 dissent in *Baldwin v. Missouri*, he stated, "I have not yet adequately expressed the more than anxiety that I feel at the ever increasing scope given to the Fourteenth Amendment in cutting down what I believe to be the constitutional rights of the States...I cannot believe that the Amendment was intended to give us carte blanche to embody our economic and moral beliefs in its prohibitions." 4. He could have been echoing the thoughts of Alexander Hamilton in *Federalist 78* when he wrote, "It can be of no weight to say that the courts, on the pretense of repugnancy, may substitute their own pleasure to the constitutional intent of the legislature." Courts today, however, make no pretense concerning their

social or economic views and continue to claim the sole constitutional right to interpret the constitution in order to achieve such views and objectives. Alexander Bickel's observations led him to write that the judiciary sees itself as having an intellect and judgment superior to elected officials. Elected officials, he claimed, are viewed as, "(S)poke-men for the expedient short-run solutions while judges (have) a greater capacity to deal with principles of long run importance. Courts," he continued, "have certain capacities for dealing with matters of principle that legislatures and executives do not possess. Judges have, or should have, the leisure, the training and the insulation to follow the ways of the scholar in pursuing the ends of government." 5. To support their claim to a constitutional right to make law they refer back to John Marshall's often cited opinion in the case of *Marbury v. Madison*, however they neglect the fact that by John Marshall's own admission his "assertions of judicial supremacy were mere *obiter dicta*, i.e. private expressions of opinion that did not form a part of the decision, the *ratio decidendi*, of the case." 6. More recently the United States Supreme Court, in the 1958 case of *Cooper v. Aaron*, declared its decisions to be, "(T)he supreme law of the land...and of binding effect upon (all) the States." 7. Such self-serving declarations bring to mind these words of Abraham Lincoln from his first inaugural address, "If the policy of the government upon vital questions affecting the whole people, is to be irrevocably fixed by decisions of the Supreme Court...the people will have ceased to be their own ruler, having to that extent practically resigned their government into the hands of that eminent tribunal." 8.

"The Constitution", writes Joseph Sobran, "was meant to assure us that every act of the federal government would be clearly traceable to a general heading: coining money, declaring war, providing postal service and a few other broad yet well-defined powers. It didn't leave much room for discretionary authority." 9. Today, however, the courts make law by judicial decree. Said Benjamin Cardozo in his book, *The Nature of The Judicial Process*, "I take judge made law as one of the existing realities of life." 10. Judicial opinions then become the law of the land with no legislative input or stamp of approval from those who should be the guardians of our republic...the Congress of The United States. Shouldn't we expect the Congress to step in and invoke their power to reign in the federal judiciary's appellate powers as spelled out under Article III? I think we should. But, based on the record, if we plan on counting on those procrastinating and pontificating Pontious Pilates of politics to stand up for us, we had better

think again. Consider this observation by Federal Judge Arthur Stanley, Jr., "I've been called on to do things that I felt properly should have fallen within the legislative field. I have a sneaking impression that Congress deliberately creates situations to avoid making decisions itself." 11.

At this point let me suggest to those who may be thinking that the solution to Congress' inaction is to elect a particular brand of politician or party to office. I wish it were that simple. Sure, we can change parties in the White House or in the United States Congress but political victories are meaningless if an activist Court will nullify any law it deems to be "unconstitutional" with arguments which, however ingenious, have no relation to the Constitution.

To many, the most blatant example of ongoing legislative activism by the federal judiciary is the ever increasing use by the courts of the Fourteenth Amendment to excise the Bill of Rights. It was the 1925 case of *Gitlow v. The People Of New York* which, for many, stands as the landmark case in which the Supreme Court accomplished this. The Court stated, "(W)e...assume that freedom of speech and of the press--which are protected by the First Amendment from abridgment by Congress--are among the fundamental "liberties" protected by the Fourteenth Amendment". 12. You may recall that the Bill of Rights as written was to apply to the federal government not the states. This is because the founding fathers had a deep and abiding fear of a strong central government. Although this may have been the founding fathers' intent it has not inhibited the federal judiciary today as they continue, through subjective rulings and decrees, to amend the United States Constitution whenever they deem it necessary to conform to their own economic or moral view of what they believe America should be.

One of the more notorious examples of judicial legislating is the Court's insistence that the First Amendment's wording grants to the court the authority to declare that the term "separation of church and state" is a constitutional imperative. Using this logic the Courts have removed any vestige of God from the classroom. You may agree with this or you may not, but it is not the right of any court to use the Fourteenth Amendment to temporarily set aside any part of the Bill of Rights in pursuit of a pragmatic philosophical objective. The founding fathers provided a method for change, it is called the amendment process, a part of the Constitution the judiciary ignores when it suits their purpose. And while all this is taking place, members of Congress, who have sworn to protect and defend the Constitution from all enemies foreign and domestic, sit upon their collective hands

claiming that it is not their place to challenge the courts inasmuch as they view them as the ultimate arbiters of Constitutional intent. Oh, really? They would do well to harken to the words of President Andrew Jackson, one known to not mince words when it came to the Court. On July 10, 1832 he stated, "Each public officer who takes an oath to support the Constitution swears that he will support it as he understands it, and not as it is understood by others. The (judiciary's) authority must not (be) permitted to control the Congress or the Executive when acting in their legislative capacities, **but to have only such influence as the force of their reasoning may deserve.**" 13. (emphasis mine)

As to the power of the sword. Article I, Section 8 of the Constitution grants to Congress alone the authority, or power "to raise and support armies"; "to provide and maintain a Navy"; and "To make Rules for the Government and Regulation of the land and naval forces." In *Federalist 78* Alexander Hamilton addressed colonists' concerns over a strong federal judiciary. "The judiciary", he proclaimed, "has no influence over either the sword or the purse". That was the intent of the Founding Fathers, but today, whatever the courts want is a constitutional imperative while everything they choose to oppose is unconstitutional.

Recently the federal judiciary has begun to take upon itself the responsibility for our nation's defense readiness. While nowhere under Article III will one find such power granted to the courts this has not deterred them for even a millisecond. Having taken unto themselves the power to legislate by decree they have now begun a quest to acquire the political power of the sword to achieve subjective goals.

In an Associated Press report of Tuesday, October 19, 1993 it was noted that the Supreme Court agreed to decide whether states and communities hard hit by cuts in defense spending may challenge military base closings in court. The justices indicated that they would review a federal appeals court ruling which let local officials and union members try to overturn the government's decision to close the Philadelphia Naval Shipyard. Lawsuits, the report continued, over individual base closings would upset the process Congress adopted for making such **politically difficult decisions**. While the loss of jobs is a tragedy it is not the responsibility of the courts to interfere with political decisions made by Congress as they carry out the responsibilities delegated to them under Article I, Section 8 of the Constitution. The responsibility for our nation's defense rests with the legislative branch of government alone, and nowhere in the Constitution is

Congress authorized in any manner to delegate this power, in any form, to the judicial branch of government; yet Congress gives its blessing to the judiciary to act on its behalf by an implied silent assent.

Another example. The courts are challenging the right of the military to set rules and regulations by restricting homosexuals from serving in the armed forces of the United States.

On January 28, 1993 United States District Judge Terry J. Hatter, Jr., in the case of *Meinhold v. United States*, otherwise known as the "Gay Sailor's Case", held that the military's policy of excluding homosexuals was "unconstitutional" claiming that it violated equal protection laws, but his remarks indicated that it was he who was ignoring not only the Constitution but factual testimony as well. For example, in paragraph 5 of his opinion Judge Hatter stated, "In determining whether the policy is rationally related, the Court cannot merely defer to the "military judgment" as the rationale for the policy--the Court must consider the factual basis underlying the "military judgment." 14. Still, when facts were presented Judge Hatter ignored them. Judge Hatter also chose to ignore a 1953 Supreme Court opinion in the case of *Orloff v. Willoughby*. In the Court's opinion the justices noted that, "(J)udges are not given the task of running the Army." 15. Judge Hatter also chose to ignore the more recent 1983 Supreme Court case of *Chappel v Wallace*. Here the Supreme Court noted that, "The complex, subtle, and professional decisions as to the composition, training, equipping, and control of a military force are essentially professional military judgments, subject **always** to civilian control of the Legislative and Executive Branches." 16. But that was then, and this is now. Congress should make it clear to the judiciary that they have trespassed into Article I powers and that they are directed to remove themselves forthwith. Unfortunately the silence from Capitol Hill is deafening.

In a letter to me Congressman Jim Talent, R-MO stated, "This decision, *Meinhold v United States*, is only one of many in a growing trend by the U.S. court system to extend its power well beyond the intentions of the framers of our Constitution." My question to Congressman Talent, and all members of a laissez faire Congress is, "You have recognized the challenge. You have articulated the challenge. When will you exercise your constitutional responsibilities and address this challenge?"

Today the Supreme Court of the United States and various inferior courts throughout the land have invaded another political area which belongs to the people alone. I refer to the principle espoused by the early colonists, to

wit, there shall be no taxation without representation. In a commentary I penned for the March 5, 1992 edition of the *St. Louis Post Dispatch*, entitled "When Judges Subvert The Constitution", I addressed the abuse of judicial power in the area of court ordered taxation. I pointed out then that, "The framers of the Constitution specifically limited the power to tax and vested such power to lay and collect taxes in the legislature...No exceptions to this view were ever expressed" 17. or, I hasten to add, implied. Earlier I quoted these words of Bishop Hoadly, "(W)hoever hath an absolute authority to interpret any written or spoken laws it is he who is truly the lawgiver." I would suggest to you that whoever controls the purse strings ultimately controls power, the ability of a government to function and the direction it shall go. Alexander Hamilton put it another way in Federalist 79 when he stated, "In the general course of human nature, *a power over a man's subsistence amounts to a power over his will.*" Of the three sources of political power to which I have referred, the power of the purse is the most critical for the power to tax is not only the power to build, but in the wrong hands it can be an instrument of destruction, and the power of total control.

When did the federal judiciary take upon itself the power tax? In November 1982, Missouri voters approved a referendum (Proposition C) which directed local school officials to reduce their operating levies by an amount equal to fifty percent of the revenues local school districts would receive under a one-cent increase in the state sales tax. 18. On July 5, 1983 the federal district court enjoined the voter approved roll back of real estate taxes. (*Liddell v Board of Educ.*, supra, 567F. Supp at 1056) and directed the Board of Education to use this money to fund the quality education programs necessary to restore the St. Louis schools to their AAA status. The U.S. Court of Appeals for the Eighth District sustained the district court's injunction of the roll back on what it termed "Equitable grounds". The court claimed that it had "**broad equitable powers to remedy...evils...(including) a narrowly defined power to order increases in local tax levies on real estate.**" 19. (emphasis mine) In a dissenting opinion Judge John R. Gibson noted that, "The Court need not and should not go this far. The taxing power of the states is primarily vested in their legislatures, deriving their authority from the people." 20. Judge Bowman concurred with Judge Gibson's opinion and stated, "I join in Judge John R. Gibson's well-reasoned dissent....and the singular inappropriateness in our Constitutional system of a federal court's ordering state and local taxing authorities to impose specific tax increases." 21. There are those who choose not to call this example a tax increase, but it

can be called nothing less when citizens are denied monies they voted for themselves. I was taught in school that taxation without representation as practiced in the late 1700s was wrong. The question is, if it was wrong then why is it right today? And, if it is wrong, where are our elected representatives to right this wrong? There is more.

In September of 1987 Judge Russell G. Clark of the District Court entered an order approving extensive Kansas City Missouri School District capital improvement projects and a far-reaching magnet schools plan. In order to fund this order Judge Clark ordered a surtax of 1.5% added to Missouri's State Income Tax for all persons and entities receiving income for work done, services rendered, and income received from activities within the KCMSD and further ordered the tax levy for the KCMSD to be raised from \$2.05 to \$4.00 per \$100 of assessed valuation. 22. On appeal the Eighth Circuit reversed the "Judicially imposed income tax surcharge, holding that **the trial court invaded the province of the legislature in ordering this surcharge**, (emphasis mine) and that the order (was) beyond the power of the district court as outlined in Specified Supreme Court and Eighth Circuit precedent". 23. On the other hand the Court of Appeals affirmed the District Court's \$1.95 levy increase in effect until the end of the 1991 - 92 fiscal year,... then authorized the Kansas City School Board to obtain from the trial court each year ad infinitum, and without voter approval, a "reasonable" levy (tax) increase over and above the \$1.95 levy (tax) to fund desegregation expenses ordered by the courts." 24. In 1988 The United States Supreme Court upheld the lower federal court's order imposing a property tax increase claiming that the order did, "satisfy equitable and **constitutional principles governing the District Court's power**." 25. (emphasis mine)

In a dissenting opinion, however, Supreme Court Justice Kennedy stated that, "The premise of the Court's analysis is infirm." He continued, "The question is whether a district court possesses a power to tax under federal law, either directly or **through delegation**." (emphasis mine) Justice Kennedy points out that, "The description of the judicial power nowhere includes the word 'tax' or anything that resembles it."; 26. but this constitutional fact did not deter the Supreme Court from upholding the lower court's order or "authorization" to increase property taxes in Kansas City, Missouri.

Such power to allocate or reallocate funds by an unaccountable judiciary denies elected officials the necessary tools to properly and responsibly represent and provide for those who have freely elected them. An unelected and unaccountable judiciary, sitting miles from the people affected,

5

has no true interest in them, only subjective goals cloaked in robes of Trojan Horse legalese. As Justice Kennedy notes in his dissenting opinion, "Perhaps it is good educational policy to provide a school district with the items included in the KCMSD capital improvement plan....(B)ut these items are part of legitimate political debate over educational and spending priorities, not the Constitution's command of racial equity." 27.

This decision "authorizing" a tax increase represents "the first in which a lower federal court has in fact upheld taxation to fund a remedial decree". 28. As Justice Kennedy noted, "...rules of taxation that override state political strictures not themselves subject to any constitutional infirmity raise serious question of federal authority." This decision, "a first" according to Justice Kennedy, sets a *stare decisis*, or precedent, which will at some time in the future affect all states, and the fact that Congress remains silent on this issue lends credibility to the claim by the courts that they do in fact have the power to tax. In his book, *The Tempting of America*, Judge Robert Bork spelled out his view of the responsibilities of the legislative vis-a-vis the judicial branch of government. He wrote, "Where the law stops, the legislator may move on to create more; but where the law stops, the judge must stop." 29. Here let me add that the only change a court may make is to change the period at the end of the law to an exclamation point!

In a column of October 18, 1993 columnist Charley Reese made this observation about government, " (T)he men who signed the Declaration of Independence and who wrote the Constitution recognized that government--any government--was the potential enemy of individual freedom. They held high the value of governments with limited powers and limited jurisdiction, bound tightly by constitutions, which they viewed as **contracts between the people and their governments.** (emphasis mine) Today", he continues, "there is virtually zilch talk about freedom or principles of good government. It's all about social and economic issues." 30. Again Justice Kennedy, "This assertion of judicial power is one of the most sensitive of policy areas, that involving taxation, (it) begins a process that over time could threaten fundamental alteration of the form of government our *Constitution embodies.*" 31. (emphasis mine) In his farewell remarks to the new nation President George Washington warned, "Let there be no change by usurpation; for through this, in one instance may be the instrument of good, it is the customary weapon by which free governments are destroyed". James Madison also noted, "I believe there are more instances of the abridgment of freedom of the people by gradual and silent encroachments of those in power,

than by violent and sudden usurpations." 32. In a recent commentary columnist Thomas Sowell wrote, "History shows many great nations and civilizations declining and falling, but we may be the first to destroy ourselves from within." 33.

In 1982 Judge Robert T. Donnelly addressed the Missouri General Assembly. In his remarks he stated, "History tells us that the Framers (of the Constitution), in establishing a federal government, were influenced by the teachings of Locke, Rousseau, and others, and by the social concept they espoused. This concept would recognize a continuing right in the people to call their agents, even the United States Supreme Court, to account. It would assure that the people, and not an agency of government, will determine the direction of their lives. If, in fact, the United States Supreme Court is exercising powers without the consent of the governed - the people - then the rights it purports to secure in their name are counterfeit - its benevolence a fraud." 34.

Again let me pose the question. Where were our elected officials while all this was taking place? Where are they today? Do they even have an opinion? In May of 1992 I traveled to Washington and visited with a number of members of Congress, among them Congressman Henry Hyde (R-IL). In his office I discussed my concern; his response, "While I'm sympathetic to your concern, on this issue frankly Congress just doesn't give a damn." Today we have a Congress that won't balance the budget, a Congress in which many members were unable or unwilling to balance their own personal checkbooks until their irresponsible and culpable behavior was exposed and a Congress which has shown a willingness to turn over to an un-elected judiciary the most sacred of trusts, the authority to tax. So who is to rein in the judiciary if not the legislative branch of government? The people? Think again!

Today the American people are under the illusion that they are being constitutionally governed, without even understanding what that means. Sure, they and members of Congress will tell you that they have read the Constitution, but without knowledge of prior intent they will never understand its true meaning. "Government", writes columnist Walter Williams, "is about coercion. Limiting government is the single most important instrument for guaranteeing liberty. We're working on the third generation which has had little in the way of education about what our Constitution means and why it was written. Thus, they fall easy prey to charlatans, quacks and hustlers." 35.

In 1982 Judge Donnelly attempted to persuade the General Assembly to petition Congress to rein in the federal judiciary. His admonishment to do so fell upon deaf ears; but as time passes we all see things in a different light.

2

In 1993 the Missouri General Assembly passed a resolution calling upon Congress to submit to the states an amendment to the Constitution which would curb the taxing powers of the judiciary. It reads, "Neither the Supreme Court nor any inferior court of the United States shall have the power to instruct or order a state or political subdivision thereof, or an official of such state or political subdivision, to levy or increase taxes."

36. Credit for the success in passing this resolution is due primarily to the tireless and persistent efforts of State Senator Walt Mueller (R-Kirkwood) and those of Representative Bill Skaggs (D-Kansas City).

Gordon Crovitz, writing in *The Wall Street Journal* noted, "No legal principal carves illegitimate rulings in stone." 37. If this be true, as I believe it to be, then no unconstitutional ruling, opinion or declaration can be wrapped in robes of declared constitutional legitimacy and become the law of the land unless the misinformed, uninformed or those who know better do not act to stop it. Inasmuch as Congress chooses to ignore the unconstitutional actions of the Court, I believe it is now up to the state legislatures to call the Supreme Court of The United States to account by calling for an amendment to the United States Constitution which will rein in the federal judiciary's usurpation of the taxing powers which belong to the people alone through their elected representatives.

In November of 1993 Senator Mueller asked me to chair a group we call The Madison Forum. In that capacity Senator Mueller, Representative Skaggs and I have contacted the majority and minority leaders in both the upper and lower chambers of every state legislature seeking support for passage in their state of a resolution identical to the one which was passed by the Missouri General Assembly in 1993. But the passing of this resolution in Missouri is just a first step on what will be a long and arduous journey. When the legislatures of thirty three additional states pass this resolution it will assume the form of a petition to Congress. Congress will then be forced to submit to the states for consideration an amendment to the United States Constitution which will curb the power to tax which the judiciary has assumed.

It has been said that Benjamin Franklin, coming out of the constitutional convention, was approached by a woman who asked him, "What kind of government have you given us?" His reply, "A Republic, madam, if you can keep it."

Senator Mueller, Representative Skaggs and I and others who feel as we do will continue to work to see that the federal judiciary and the Supreme

Court are brought to account for their unconstitutional actions. It is our intention to insure that this government will remain the Republic to which Benjamin Franklin referred. A Republic for which thousands have given their last great measure of personal sacrifice. A Republic in which those inseparable twins, liberty and freedom will not, like sand, slip through our fingers.

We intend to share with others these self evident truths which the founding fathers embraced knowing full well this is the only way to insure that this Republic will remain a government of the people, by the people and for the people. So help us God.

END

John R. Stoeffler - Chairman
The Madison Forum
847 Labonne Parkway
Manchester, MO 63021

FOOTNOTES

1. Alexander M. Bickel, The Least Dangerous Branch, Yale University Press (2nd Edition), Pg 92 - 93
2. Chief Justice Robert T. Donnelly, The State of The Judiciary in Missouri, 1982 Journal of The Senate, pg 82
3. Robert Bork quoting Bishop Hoadly in The Tempting of America, The Free Press, pg 176
4. Baldwin v Missouri, 281 U.S. 586.595 (1930) (J. Holmes dissenting opinion)
5. Cited in The Tempting of America, Robert H. Bork, The Free Press, pg 151
6. Congressman Robert K. Dornan and Csaba Vedlik, Jr., Judicial Supremacy: The Supreme Court On Trial, Nordland Series In Contemporary American Social Problems, 1980, pg 85
7. Cooper v Aaron, (358 U.S. 1) 78 S. Ct. 1401, pg 1410
8. Cited in Haines, Judicial Supremacy, pg 333, and Corwin, Court Over Constitution, pg 71
9. Joseph Sobran writing in The Conservative Chronicle, 11-11-92, pg 17

- 7
10. Benjamin N. Cardozo, The Nature of The Judicial Process, (New Haven: Yale University Press, 1921) pg 10
 11. Judge Arthur Stanley Jr.. Quoted in The Kansas City Star, 3-1-92, pg B-2
 12. Gitlow v The People of New York, (268 U.S. 652) 45 S. Ct., pg 630
 13. Cited in Haines, Judicial Supremacy, pg 333, and Edwin S. Corwin, Court Over Constitution pg 71
 14. Judge Hatter Citing Pruitt v Chaney, 963 F 2d at 1166 - 67
 15. Orloff v Willoughby, (345 U.S. 83) 73 S. Ct., pg 540
 16. Chappel v Wallace, (462 U.S. 296) 103 S. Ct., pg 2366
 17. John R. Stoeffler, When Judges Subvert The Constitution, St. Louis Post Dispatch, Commentary Page, 3-5-92
 18. Mo. Rev. Stat. 164.013 (Supp. 1983)
 19. 731 Federal Reporter 2d Series, pg 1320
 20. *ibid*, pg 1332
 21. *ibid*, pg 1333
 22. Brief for Amici Curie, State of Missouri v Kalima Jenkins, Court No. 88-1150, June 1989
 23. *ibid*
 24. *ibid*
 25. Missouri v Jenkins, 110 S. Ct. 1651 (1990)
 26. *ibid*
 27. *ibid*
 28. *ibid*
 29. Robert H. Bork, The Tempting Of America, The Free Press, pg 151

30. Charley Reese writing in The Conservative Chronicle, 11-3-93, pg 18
31. Missouri v Jenkins, 110 S. Ct. 1651, 1990
32. David Robertson, Debates And Other Proceedings Of The Convention Of Virginia, Richmond, 1805, pg 87
33. Thomas Sowell writing in The Conservative Chronicle, 12-15-93, pg 21
34. Chief Justice Robert T. Donnelly, The State of The Judiciary In Missouri, 1982 Journal of The Senate, pg 81
35. Walter Williams writing in The Conservative Chronicle, 12-8-93, pg 15
36. House Substitute for Senate Concurrent Resolution NO. 9, Journal of the House, 5-5-93, pg 1846 and House Substitute for Senate Concurrent Resolution No. 9, Final vote 5-10-93. (passed 118 "ayes" to 30 "noes") pg 2091
37. Grodon Crovitz writing in The Wall Street Journal, 7-10-91, pg A-11

I have read your *The Case For A Constitutional Amendment* and congratulate you on a job well done. It is extremely well documented and very forceful. I wish you well.

As you know, you are taking on a daunting task in trying to educate the people in this matter. The Court, without any authority, has literally taken over a substantial portion of social policy in the nation. It has done this by telling the people that "the Constitution requires it." Felix Frankfurter wrote to President Franklin Roosevelt, "People have been taught to believe that when the Supreme Court speaks it is not they who speak but the Constitution, whereas, of course...it is they who speak and not the Constitution. And I verily believe that that is what the country needs most to understand."

Letter to John R. Stoeffler
From The Honorable Robert T. Donnelly
Chief Justice of Missouri
1973 - 1975 1981 - 1982

SCOMM

99:21

Alaska State Legislature

REPRESENTATIVE
JAMES J. JAMES

322
Juneau, Alaska 99705
(907) 488-1546
FAX (907) 488-9006



Juneau
Capitol
Juneau, Alaska
99801-1182
(907) 465-3743
FAX (907) 465-2381

House of Representatives
House District 34

SPONSOR STATEMENT

HJR #31

4-12-95

The current federal Internal Revenue Code is characterized by loopholes, exceptions, exemptions, complicated schedules, and targeted tax breaks, which makes it difficult for the taxpayer to calculate the tax obligation due. Thus, there is a real need to replace the current system with one that is more fair and simple.

This resolution calls for the United States Congress to enact legislation replacing the current IRS tax code with a "flat" tax. This will create a tax system that is less difficult to comply with and tax all income once. A "flat" tax would also exclude from the definition of taxable income the earnings from personal and business savings, encouraging individual's and families to save and invest a portion of their incomes.

Fact and Comment

By Malcolm S. Forbes Jr., *Editor-in-Chief*



DUMBLY DERAILING THE DOLLAR

NOT SINCE the 1970s and, briefly, before the 1987 stock market crash, has Washington so thoroughly undermined the integrity of the dollar. The Clinton Administration still seeks more growth-killing taxes and regulations. More immediately destructive has been the Federal Reserve's simultaneously raising the price of money and continuing to pump more liquidity into the banking system. All this is a sure-fire formula for economic stagnation and inflation.

Our central bank should simply withdraw credit from

the economy by selling bonds in its open-market operations. Long-term interest rates would quickly fall back, and the assault on the dollar would cease. The White House should unequivocally and consistently forswear bashing the buck as a trade weapon. After all, Clinton hero John Kennedy recognized the importance of a strong dollar. As for strengthening the economy, when will the President embrace Kennedy-style, across-the-board income tax cuts?

HAPPY DAYS WILL BE HERE AGAIN

REPRESENTATIVE DICK ARMEY (R-Tex.) has introduced a flat-tax bill that will, when enacted, set off a seismic economic boom.

Arme's legislation would sweep away the entire income tax code, which has ballooned, over 80 years, into a multi-thousand-paged monstrosity. Personal income would be taxed at a flat 17% rate. Deductions for dependents would be sizable. A family of four wouldn't be liable for tax until its income exceeded \$36,800. (A married couple would have an exemption of \$26,200. Each dependent would add \$5,300.)

Arme's low rate is predicated on Congress' enacting significant spending cuts. But even without the reductions, the levy would go up only 3 points, to 20%.

Exactions on capital gains, estates, interest and dividends would be eliminated. Ten million people would be removed from income tax rolls. Most Americans' tax liabilities would decline despite the loss of deductions for mortgages, state income and property taxes, charitable contributions, etc. The corporate profits tax would also be 17%, even though companies could charge off capital investments immediately.

The impact of such a proposal would be resoundingly, enthusiastically positive. Stocks would rocket, thanks to the elimination of the capital gains tax. Savings would soar because of the abolition of double taxation on dividends and interest. New business would blossom both because of the increased pool of capital and because the capital gains

tax would no longer act as a barrier to money's moving from old investments to new investments. The economy would expand robustly for years to come.

The quality of life would improve, too: The current tax bias against families would end.

The flat tax's simplicity would redirect an immeasurable amount of American brainpower from the numbing exercise of coping with our incomprehensible tax code to more productive purposes. There would be an enormous increase in efficiency. Alvin Rabushka, coauthor with Robert Hall of the proposal on which Arme has based his bill, estimates that this reform would remove a \$200 billion burden on the economy—\$100 billion now spent filling out tax forms and other forms of compliance and

another \$100 billion wasted from investments being made for tax rather than economic purposes.

A flat tax would get rid of a profoundly corrupting influence on our political life: the countless millions of dollars now showered on politicians and bureaucrats to influence tax-related rules and legislation.

The Arme bill would be fairer than the current regime. No longer would there be striking disparities between tax liabilities on similar incomes. The more you made, the more you would pay. And

what could be fairer than relieving millions of individuals of any income tax payments?

Moreover, as the experiences with the Kennedy and Reagan tax cuts indicate, the so-called rich would end up



Representative Arme:
Prosperity-producing proposal.

The federal, state, and local tax systems are too complex to present.

Robert E. Hall
Alvin Rabushka

FLAT TAX



Published in 1985 and being revised, it remains the flat-tax bible.

aying a greater proportion of the levies collected.

Government revenues would mushroom, thanks to the boom. (A great, largely unnoted fact: Tax receipts grow faster in low-tax economies.)

Losers? Lobbyists, of course. Also liberals, whose control over our lives and purses would be dramatically curtailed. Careers of tax accountants and lawyers would also be disrupted, but only temporarily. Their skills would now be employed for more gratifying purposes than grappling with complex, economically useless tax laws.

Another problem: The resultant economic expansion would create labor shortages as unemployment virtually

disappeared. But this pressure would force employers to do more job training, and we would hear fewer calls for such programs of the government variety.

Republicans should embrace Arney's bill quickly. As Bill Clinton sees his troubles multiply, he will be desperately looking for ways to restore his popularity. (Changes in policy; more than in White House staff, are needed.)

Wise congressional and putative presidential candidates of either party would do well to hop on Arney's bandwagon early. Cynics will downplay the chances of something like the Arney bill's becoming law. They're badly misjudging the temper of our times.

THE REAL PEACE PROCESS

THE ISRAELI PARLIAMENT has just passed legislation that could turn that country into a Middle East Hong Kong. The law will establish genuine free-trade zones, starting in the economically depressed Negev desert region. Dubbed the Free Export Processing Zone (FEPZ), this about-to-be-economically-liberated area will be patterned after similar ones in China that have transformed empty backwaters into sizzling sectors of growth.

Few economies today are more overtaxed and overregulated than Israel's. The FEPZ will unleash that country's formidable entrepreneurial energies. Its success will create

pressures for similar treatment in the rest of Israel. It won't be too many years before the whole country will be a free-enterprise zone despite opposition from special interests.

This dawn of deregulation comes not a moment too soon. As the peace process proceeds, Israel badly needs robust economic expansion to ameliorate what will be growing social tensions among various parts of its population. Jerusalem must also be a free-enterprise model for neighboring Arabs, particularly the Palestinians. Statism has severely hobbled economic progress in that region and has, in turn, provided ready fodder for fundamentalism and terror.

THOSE "AMATEUR" DIPLOMATS

RECENTLY *People* magazine excoriated the Clinton Administration for naming a higher percentage of "influential friends" to overseas ambassadorships as "purely political payoffs" than did either Ronald Reagan or George Bush, amply criticized by then-Senator Gore and others for similar selections.

It's a bum rap. The sniping and whining emanate from foreign service officers who think these diplomatic plums should go only to members of their own priesthood.

The prime mission of most ambassadors is to generate "a positive spin" for the U.S. and to see that the embassies are ably managed. One doesn't need lifelong diplomatic training to handle these goodwill and administrative chores.

The distinction between "professional" and "amateur" diplomats is often artificial. One of our most formidable strategists and negotiators has been Henry

Kissinger, who never had foreign-officer training. Nor did other foreign policy heavyweights such as Zbig Brzezinski or George Shultz.

Other successful "amateurs" over the years include Walter Annenberg in Britain, John Kenneth Galbraith and Daniel Patrick Moynihan in India, Jeane Kirkpatrick at the U.N., Edward Ney in Canada, and Frank Shakespeare in Portugal and the Vatican.

Wise governments don't mind an alleged nonprofessional U.S. envoy if he or she is a friend of the President's. Such a person can often get a message through to the President more quickly, more forcefully than a foreign service officer. Thus, while the Swedish government would be too diplomatic to say it publicly, it would much prefer our current emissary, Thomas Siebert—a successful lawyer who is a close friend of Bill Clinton's from college days—to a State Department bureaucratic diplomat.

NOT ALL WARS ARE WRONG

Regeneration—by Pat Barker (Plume, \$10). Well-written antiwar novel with a dose of politically correct feminism. Centers on military hospital psychiatrist Dr. William Rivers, whose mission is to restore shell-shocked soldiers to "sanity" so that they may return to the insanity of World War I trench warfare. His most notable patient: poet Siegfried Sassoon, now a decorated officer, who has issued a pacifist declaration that he will no longer fight. For political reasons, the Army decides to send Sassoon to a mental hospital rather than to a court-martial. Rivers succeeds with Sassoon, who refuses to back down from his statement but decides to return to the trenches.

Rivers and Sassoon were real-life characters,

as were author Robert Graves and poet Wilfred Owen, who also make appearances in this novel.

Sassoon was mistaken to say, "I'm not protesting against the conduct of the war." It was precisely the way the military managed the conflict that brutalized Europe and set in train forces that nearly destroyed Western civilization. The Great War, as it was called then, quickly came to be seen by many after its close as a purposeless struggle that slaughtered countless millions and shattered the civilized fabric of prewar life. By contrast, while the American Civil War had its share of World War I-like horrors, combatants and future generations alike saw it as a struggle whose noble purposes justified the immense sacrifices. ■



F I S C A L N O T E

REQUEST:

Revision Date: Original Affected Agency: _____
Title: Endorse Federal Flat BRU: _____
Income Tax
Sponsor: Representative James Components: _____
Requestor: _____

EXPENDITURES/REVENUES: (THOUSANDS OF DOLLARS)

OPERATING	FY 96	FY 97	FY 98	FY 99	FY 2000	FY 2001
Personal Services	0.0	0.0	0.0	0.0	0.0	0.0
Travel	0.0	0.0	0.0	0.0	0.0	0.0
Contractual	0.0	0.0	0.0	0.0	0.0	0.0
Supplies	0.0	0.0	0.0	0.0	0.0	0.0
Equipment	0.0	0.0	0.0	0.0	0.0	0.0
Land & Structures	0.0	0.0	0.0	0.0	0.0	0.0
Grants, Claims	0.0	0.0	0.0	0.0	0.0	0.0
Miscellaneous	0.0	0.0	0.0	0.0	0.0	0.0
TOTAL OPERATING	0.0	0.0	0.0	0.0	0.0	0.0

CAPITAL

REVENUE

FUNDING: (THOUSANDS OF DOLLARS)

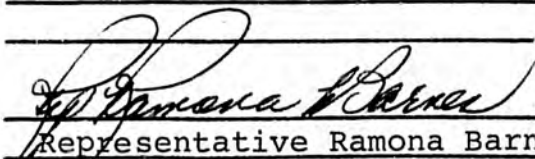
General Fund	0.0	0.0	0.0	0.0	0.0	0.0
Federal Fund	0.0	0.0	0.0	0.0	0.0	0.0
Other	0.0	0.0	0.0	0.0	0.0	0.0
TOTAL	0.0	0.0	0.0	0.0	0.0	0.0

POSITIONS:

Full-Time	0	0	0	0	0	0
Part-Time	0	0	0	0	0	0
Temporary	0	0	0	0	0	0

Estimated FY 95 Impact: 0

ANALYSIS: (ATTACH A SEPARATE PAGE IF NECESSARY)

Prepared By: World Trade and State/Federal Relations Cmmtte. Date: 4/19/95
Division: _____ Phone: _____
Approved By: 
Agency: Representative Ramona Barnes, Chair Date: 4/19/95

DISTRIBUTION (BY PREPARER)
LEGISLATIVE FINANCE
LEGISLATIVE SPONSOR

REQUESTOR
OFFICE OF MANAGEMENT AND BUDGET
AGENCY(IES)

Revision Date: _____ Dept. Affected: Revenue
Title: Endorse Federal Flat Income Tax BRU: Audit Operations
Sponsor: Rep. James, Kott Component: Income and Excise Audit
Requestor: (H) WTR COMPONENT SERIAL NO. 113

Expenditures/Revenues:

(Thousands of Dollars)

OPERATING	FY 96	FY 97	FY 98	FY 99	FY 00	FY 01
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	0.0	0.0	0.0	0.0	0.0	0.0

CAPITAL						
---------	--	--	--	--	--	--

REVENUE FUND SOURCE:	0.0	0.0	0.0	0.0	0.0	0.0
----------------------	-----	-----	-----	-----	-----	-----

FUNDING:

(Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF						
1005 GF/Program Receipts						
1006 GF/MHTIA						
Other						
TOTAL	0.0	0.0	0.0	0.0	0.0	0.0

POSITIONS:

FULL-TIME						
PART-TIME						
TEMPORARY						

Estimate of current (FY95) impact \$ 0.0

ANALYSIS: (Attach a separate page if necessary)

This resolution urges the U. S. Congress to replace the current Internal Revenue Code (IRC) with the levy of a fixed or "flat" tax. This fiscal note is based on the premise that enactment of a flat tax by Congress would pertain only to individual income taxation. Since the state of Alaska does not currently have an individual income tax, this resolution has no effect on revenue. If this resolution impacts corporation tax provisions under the IRC, there may be an impact on revenue from the state's corporation income tax program which is based on the IRC. It is not feasible for DOR to determine impacts on corporation tax revenue since details on the structure of the flat tax are not currently available.

Prepared by: Robert N. Bartholomew, Deputy Director Phone: 465-2320
Division: Income and Excise Audit Date: 4/19/95
Approved by Commissioner: [Signature] Date: 4/19/95
Agency: Department of Revenue

PREPARER TO PROVIDE ALL DISTRIBUTION COPIES TO GOVERNOR'S LEGISLATIVE OFFICE

For further distribution information call the Governor's Legislative Office