Received(Date): 1 MAY 2003 17:28:38
From: "Matal, Joe (Judiciary)" <Joe_Matal@Judiciary.senate.gov> ("Matal, Joe (Judiciary)" <Joe_Matal@Judiciary.senate.gov> [UNKNOWN])
To: Brett M. Kavanaugh (CN=Brett M. Kavanaugh/OU=WHO/O=EOP@EOP [WHO])
Subject: : ISCRAA: votes and tax power
P_2833G003_WHO.TXT_1.html
P_2833G003_WHO.TXT_2
P_2833G003_WHO.TXT_3.wpd
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CREATION DATE/TIME: 1-MAY-2003 17:28:38.00
SUBJECT:: ISCRAA: votes and tax power
TO:Brett M. Kavanaugh (CN=Brett M. Kavanaugh/OU=WHO/O=EOP@EOP [WHO])
READ:UNKNOWN
End Original ARMS Header

Brett: here is a memo discussing Congress's tax authority, and the Republican Policy Committee record analysis for the vote on the sliding-scale fee cap on the McCain tobacco bill. (I include both in WordPerfect and pdf because some have had trouble opening my WordPerfect documents.) Please do not hesitate to call me if you have any questions.

Joe Matal
Counsel to Senator Kyl
Work: 224-4076
P6/b(6)
- att1.htm - ISCRAA1998McCainBillVotes.pdf - ISCRAA1998McCainBillVotes.wpd - ISCRAATaxPowerMemo.wpd - ISCRAATaxPowerMemo.pdf
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File attachment <P_2833G003_WHO.TXT_4>

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File attachment <P_2833G003_WHO.TXT_5>

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Joe Matal

Counsel to Senator Kyl

Work: 224-4076

P6/b(6)

1.

SENATE RECORD VOTE ANALYSIS

105th Congress
2nd Session
June 16, 1998, 2:32 p.m.
Page S- 6381 Temp. Record
Vote No. 160

TOBACCO BILL/Sliding Scale Limit on Attorney Fees

SUBJECT:

National Tobacco Policy and Youth Smoking Reduction Act . . . S. 1415. Gorton modified amendment No. 2705 to the Daschle (for Durbin) amendment No. 2437, as amended, to the instructions (Gramm amendment No. 2436) to the Gramm motion to recommit the Commerce Committee modified substitute amendment No. 2420.

AMENDMENT AGREED TO, 49-48

SYNOPSIS:

The "Commerce-2" committee substitute amendment (see NOTE in vote No. 142) to S. 1415, the National Tobacco Policy and Youth Smoking Reduction Act, will raise up to $265.0 billion over 10 years and up to $885.6 billion over 25 years from tobacco company "payments" (assessments) and from "look-back" penalties that will be imposed on tobacco companies if they fail to reduce underage use of tobacco products. Most of the money will come from the required payments ($755.67 billion

over 25 years). Additional sums will be raised from other fines and penalties on tobacco companies, and the required payments will be higher if volume reduction targets on tobacco use are not met. The tobacco companies will be required to pass on the entire cost of the payments to their consumers, who are primarily low-income Americans. By Joint Tax Committee (JTC) estimates, the price of a pack of cigarettes that costs $1.98 now will rise to $4.84 by 2007. The amendment will require the "net" amount raised, as estimated by the Treasury Department, to be placed in a new tobacco trust fund. (The net amount will be equal to the total amount collected minus any reductions in other Federal revenue collections that will occur as a result of increasing tobacco prices. For instance, income tax collections will decline because there will be less taxable income in the economy). The JTC estimates that the amendment will raise up to $232.4 billion over 9 years, but only $131.8 billion net. Extending the JTC's assumptions through 25 years, a total of $514.2 billion net will be collected. The amendment will require all of that money to be spent; 56 percent of it will be direct (mandatory) spending. The Federal Government will give States 40 percent of the funds and will spend 60 percent. Medicare will not get any of the funding in the first 10 years unless actual revenues are higher than estimated in this amendment (in contrast, the Senate-passed budget resolution required any Federal share of funds from tobacco legislation to be used to strengthen Medicare; see vote No. 84).

The Gramm motion to recommit with instructions would direct the Commerce Committee to report the bill back with the inclusion of the amendments already agreed to and the Gramm amendment No. 2437. The Gramm amendment would adopt the Gregg/Leahy amendment (see NOTE below) and would eliminate the marriage penalty in the tax code on couples earning less than $50,000 per year. The tax relief would be structured so that married couples that received it would not consequently lose Earned Income Credit (EIC) eligibility.

The Durbin amendment, as amended, would cap the look-back penalties at $7.7 billion annually and would shift the burden of those penalties on to those companies that have brands that do not meet the youth smoking reduction targets (see vote No. 149 for details). As amended by a Craig/Coverdell amendment, it would also fund anti-drug programs (see vote No. 151). As amended by a Gramm modified amendment, it would phase-in marriage-penalty relief over 10 years for married tax filers with incomes under $50,000, and it would provide immediate 100 percent deductibility of health care costs for self-employed taxpayers (see vote No. 154). As amended by a Kerry amendment, it would require States to spend a quarter of their funding from this bill on Child Care Development Block Grants (see vote No. 157). As amended by a Reed amendment, a tobacco company that violated certain FDA regulations would be denied the advertising tax deduction (see vote No. 159).

The Gorton amendment would subject plaintiffs' fees for government and private class-action suits on tobacco to judicial review (the review would be in the last court in which the action was pending), and would enact a sliding-scale cap that would limit the maximum hourly fees that could be awarded based upon when the suits

began. In determining fees, judges would be required to consider a number of specified criteria, including how likely it was that the suit would succeed when it was commenced, the amount of work that was considered likely when the suit began and the amount of work actually done, the degree of skill and legal innovation demonstrated by the attorney, the amount that was expended that was not reimbursable or would not be reimbursed unless the suit succeeded, whether the attorney was obligated to continue the suit to its conclusion, and whether risk of success in the suit was decreased due to developments from other suits or from changes in State or Federal law. Under no circumstances would a judge award, after actual expenses: more than $4,000 per hour for actions filed before December 31, 1994; more than $2,000 per hour for actions filed on or after December 31, 1994 but before April 1, 1997; more than $1,000 for actions filed on or after April 1, 1997 but before June 15, 1998; or $500 for actions filed after June 15, 1998. (In many States, State attorneys general entered into contingency fee arrangements with contingency-fee trial lawyers. Without caps, some of those lawyers who did very little work could receive in excess of $90,000 per hour for the time they spent on the suits. The only provision that this bill has to deal with exorbitant contingency fees is a section that will allow either of the parties that entered into the contingency-fee arrangements in the first place, the plaintiffs or the plaintiffs' lawyers, to request arbitration, in which case each would pick one arbitrator, and a third arbitrator would be picked with the approval of both sides.)

NOTE: Two Gregg/Leahy amendments were pending at the time of the vote (see vote No. 145).

Those favoring the amendment contended:

Argument 1:

The contingency-fee arrangements that have been entered into between many States and trial lawyers to pursue tobacco lawsuits will drain away billions of dollars that should go to pay State Medicare expenses. In some cases, they will result in grotesquely exorbitant fees (by the estimate of one expert who has examined the arrangements, as many as 25 trial lawyers may end up billionaires). Nevertheless, some of us opposed earlier efforts to limit contingency fees because those efforts treated the lawyers involved inequitably. When these cases first began in the early 1990s, the likelihood that the lawyers who were hired would succeed was extremely small. Over time, through the great skill and dogged persistence of those lawyers, novel legal theories were developed and large numbers of industry documents were gathered. As a result, success became ever more likely. More States then began to jump on the bandwagon, and they hired lawyers to represent them. The later the lawyers entered the game, the less work they had to do, and the more likely it was that

they would get a huge windfall in contingency fee payments (that is, if they were in a State that agreed to such arrangements; many States used their own lawyers or capped the fees of the lawyers they hired). Frankly, we believe that the lawyers who started this process deserve a lot more money than $1,000 per hour for the work they have done, the huge risks they have taken, and the huge, multimillion dollar expenses they have incurred on the long-shot chance they have taken and won. The late- comers deserve much less. Therefore, in this amendment, we have set a series of caps on fees, ranging from $4,000 per hour for the lawyers who started the process, down to $500 per hour for lawyers who file suits in the future (that final cap is very generous, considering that it will be difficult to lose future cases, and few tobacco company lawyers, or any other lawyers for that matter, make as much as $500 per hour).

Some of our colleagues supported amendments to cap lawyer fees at $250 per hour and $1,000 per hour, and will find it hard to vote for fees that could climb as high as $4,000 per hour. To those Senators, we urge them to instead look at the amendment as a $90,000-per-hour-plus pay cut for trial lawyers, because without this amendment some lawyers will likely get paid that much or more. That money will come right out of the tobacco settlement money being given to States for Medicare, which primarily provides health care to frail elderly patients of modest means. Most of those Senators who opposed those earlier amendments oppose this amendment as well, though they obviously are becoming uncomfortable with that position because their argument now is that the Gorton amendment would result in lawyers being paid too much. With all due respect, their argument is not rational. They say we should not suggest a $4,000 cap for the lawyers who have done the most work, because judges will then automatically go to that level. They say if we did not suggest that cap, judges would favor less pay. However, they are well aware that a district judge in Texas has already supported an hourly wage equivalent of more than $40,000 for the lawyers hired for that State's tobacco suit. Our colleagues' alternative is no cap at all. Further, if their concern was really that $4,000 is too much for a cap, then they should have voted for the $250 or $1,000 caps. The reality is that there is no magic number between $1,000 and $4,000 that some of our more liberal colleagues will support. The reality is that they will not vote for anything that may cut the pay that trial lawyers will receive, however little work those lawyers did, however high that pay may be, and however much it takes away from settlement money that should be going to Medicare.

Our hope is that with this amendment we have found compromise ground. The Gorton amendment would recognize the extremely able work by the lawyers who were involved in the tobacco suits early on, and it would allow them to be paid very generously. Lawyers who filed suit later, and did very little work, would receive much less. This amendment is fair, and deserves our support.

Argument 2:

What is a fair price to pay lawyers out of tobacco settlement money that is supposed

to be used for Medicare? Should they get $250 per hour for work they did on lawsuits that will be settled by this legislation? Our colleagues said that was not enough. How about $1,000 per hour? Our colleagues rejected that huge hourly cap as well. Now we are asking them to limit fees to "only" $4,000 per hour. Many of our colleagues are again shamelessly saying that is not enough. We think that it was unethical for States to hire trial attorneys on a contingency-basis in the first place. Contingency fees should only be used when a client cannot otherwise afford representation, and every State can afford representation. In many cases, the lawyers who were hired for these tobacco suits were the close personal, or at least close political, friends of the State politicians who hired them. It is very difficult for us to vote for a $4,000-per-hour pay "cap" for trial lawyers who were unethically hired to pursue these tobacco cases. Still, the alternative of letting them being paid $90,000 per hour or more is much worse, so we will support this amendment.

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Argument 2:

We oppose this amendment for the same reasons that we opposed the earlier efforts to limit attorneys fees. As far as we are concerned, the lawyers involved have valid contracts, and they have earned every penny of the hundreds of millions or billions of dollars that they will be paid. Therefore, this amendment should be rejected.

VOTING YEA:

Repub licans:

(45 or 85%) Abraham Allard Ashcroft Bond Brownback Burns Campbell Chafee Coats Collins Coverdell Craig Domenici Enzi Faircloth Frist Gorton Gramm Grams

Grassley Gregg Hagel Helms Hutchinson Hutchison Inhofe Kempthorne Kyl Lugar Mack McCain McConnell Murkowski Nickles Roberts Santorum Sessions Smith, Bob Smith, Gordon Snowe Stevens Thomas Thompson Thurmond Warner

Demo crats:

(4 or 9%) Byrd Dodd Dorgan Lieberman

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(8 or 15%) Bennett Cochran D'Amato DeWine Hatch Jeffords Roth Shelby

Demo crats:

(40 or 91%) Akaka Baucus Biden Bingaman Breaux Bryan Bumpers Cleland Conrad Daschle Durbin Feingold Feinstein Ford Glenn Graham Harkin Hollings Inouye Johnson Kennedy Kerrey Kerry Kohl Landrieu Lautenberg Leahy Levin Mikulski Moseley-Braun Moynihan Murray Reed Reid Robb Rockefeller Sarbanes Torricelli Wellstone Wyden

NOT VOTING:

Repub licans:

(1) Specter-3

Demo crats:

(0)

ABSENCE CODE: 1-Official Business 2-Necessarily Absent 3-Illness 4-other Symbols: AY-Announced Yea AN-Announced Nay PY-Paired Yea PN-Paired Nay

Compiled and written by the staff of the Republican Policy Committee

Larry E. Craig, Chairman

TOP

1.

HEADING, SUBJECT, RESULT, SYNOPSIS, DEBATE, TALLY
NEXT VOTE, PREVIOUS VOTE, SUBJECT INDEX, CHRONOLOGICAL LIST,
HOME, CAMERA COPY

SENATE RECORD VOTE ANALYSIS

105th Congress
2nd Session
June 16, 1998, 2:32 p.m.
Page S- 6381 Temp. Record
Vote No. 160

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Johnson Kennedy Kerrey Kerry Kohl Landrieu Lautenberg Leahy Levin Mikulski Moseley-Braun Moynihan Murray Reed Reid Robb Rockefeller Sarbanes Torricelli Wellstone Wyden

NOT VOTING:

Republicans:

(1) Specter-3

Democrats:

(0)

ABSENCE CODE: 1-Official Business 2-Necessarily Absent 3-Illness 4-other
Symbols: AY-Announced Yea AN-Announced Nay PY-Paired Yea PN-Paired Nay

Compiled and written by the staff of the Republican Policy Committee

Larry E. Craig, Chairman

TOP

M E M O R A N D U M

TO: Brett Kavanaugh

FROM: Joe Matal, Counsel to Senator Kyl

DATE: April 31, 2003

RE: ISCRAA and Congress's Power to Tax

Here are some legal authorities indicating that Congress has the power to apply ISCRAA's excise taxes to MSA fee income received within the last year:

First, as noted in Senator Kyl's speech, the Supreme Court has "repeatedly upheld [moderately] retroactive tax legislation against a due process challenge." United States v. Carlton, 512 U.S. 26, 30-31 (1994); *see id.* at 33 (upholding tax whose "actual retroactive effect * * * extended for a period only slightly greater than one year"). ISCRAA only taxes income received since June 1, 2002 – thus reaching back less than one year.

Second, because ISCRAA is a tax, it does not constitute a taking. As the Supreme Court made clear over a century ago, "neither is taxation for a public purpose, however great, the taking of private property for public use, in the sense of the Constitution." Mobile County v. Kimball, 102 U.S. 691, 703 (1880).

Since that time, the Supreme Court also has made clear that a tax is a tax so long as all of its provisions are adapted to the collection of revenue, and it raises at least a "negligible" amount of money. A tax is not invalid for imposing a "crushing effect" on particular businesses, and Congress's motives in imposing the tax are irrelevant. In short, "[a]s is well known, the constitutional restraints on taxing are few * * * * The remedy for excessive taxation is in the hands of Congress, not the courts." United States v. Kahriger, 345 U.S. 22, 28 (1953), overruled on other grounds, Marchetti v. United States, 88 S.Ct. 697 (1968).

The following authorities speak directly to these points:

- Sonzinsky v. United States, 300 U.S. 506 (1937), involved multiple, punitive federal taxes imposed on the sale of sawed-off shotguns, machineguns, and silencers. The party challenging the tax "insist[ed] that the present levy is not a true tax, but a penalty imposed for the purpose of suppressing traffic in a certain noxious type of firearms, the local regulation of which is reserved to the states because not granted to the national government." Id. at 512. The litigant argued that:

  [t]he cumulative effect on the distribution of a limited class of

> firearms, of relatively small value, by the successive imposition of different taxes, one on the business of the importer or manufacturer, another on that of the dealer, and a third on the transfer to a buyer, is * * * prohibitive in effect and * * * disclose[s] unmistakably the legislative purpose to regulate rather than to tax.

The Supreme Court did not reject this characterization of the tax's effect. Instead, it simply held that:

> "[A] tax is not any the less a tax because it has a regulatory effect; and it has long been established that an Act of Congress which on its face purports to be an exercise of the taxing power is not any the less so because the tax is burdensome or tends to restrict or suppress the thing taxed.
>
> "Inquiry into the hidden motives which may move Congress to exercise a power constitutionally conferred upon it is beyond the competency of courts. They will not undertake, by collateral inquiry as to the measure of the regulatory effect of a tax, to ascribe to Congress an attempt, under the guise of taxation, to exercise another power denied by the Federal Constitution.
>
> "Here the annual tax of $200 is productive of some revenue. We are not free to speculate as to the motives which moved Congress to impose it, or as to the extent to which it may operate to restrict the activities taxed. As it is not attended by an offensive regulation, and since it operates as a tax, it is within the national taxing power."

_____ Id. at 513-514.

- United States v. Kahriger, 345 U.S. 22 (1953), overruled on other grounds, Marchetti v. United States, 88 S.Ct. 697 (1968), involved a heavy federal tax on gambling proceeds. The party challenging the tax argued that "Congress, under the pretense of exercising its power to tax has attempted to penalize illegal intrastate gambling through the regulatory features of the Act, and has thus infringed the police power which is reserved to the states." Id. at 23 (citation omitted). The litigant argued that "because there is legislative history indicating a congressional motive to suppress wagering, this tax is not a proper exercise of such taxing power." Id. at 27.

  The Court responded:

  > The intent to curtail and hinder, as well as tax, was also manifest in the following cases, and in each of them the tax was upheld: Veazie Bank v. Fenno, 8 Wall. 533, 19 L.Ed. 482 (tax on paper money issued by state banks); McCray v. United States, 195 U.S.

> 27, 59, (tax on colored oleomargarine); United States v. Doremus, 249 U.S. 86 and Nigro v. United States, 276 U.S. 332 (tax on narcotics); Sonzinsky v. United States, 300 U.S. 506 (tax on firearms); United States v. Sanchez, 340 U.S. 42 (tax on marihuana)." Id. at 27.

The Court continued: "a federal excise tax does not cease to be valid merely because it discourages or deters the activities taxed. Nor is the tax invalid because the revenue obtained is negligible." Id. at 28 (emphasis added). And to give some indication of what would constitute a negligible tax, the Court noted that it had upheld, in the McCray case, a tax on adulterated butter that collected only $3,501. Id.

The Kahriger Court concluded that:

> "It is axiomatic that the power of Congress to tax is extensive and sometimes falls with crushing effect on businesses deemed unessential or inimical to the public welfare * * * * As is well known, the constitutional restraints on taxing are few * * * * The remedy for excessive taxation is in the hands of Congress, not the courts." Id. See also id. at 30 (noting precedent upholding federal that "obliterated from circulation all state bank notes") (citing Veazie Bank v. Fenno, 8 Wall. 533, 19 L.Ed. 482).

- In more recent years, the Supreme Court has reaffirmed these holdings. See, e.g. Department of Revenue of Montana v, Kurth Ranch, 511 U.S. 767, 779 (1994) ("We have cautioned against invalidating a tax simply because its enforcement might be oppressive or because the legislature's motive was somehow suspect"); Bob Jones University v. Simon, 416 U.S. 725, 741 n.2 (1974) ("It is true that the Court in * * * [the past] drew what it saw at the time as distinctions between regulatory and revenue-raising taxes. But the Court has subsequently abandoned such distinctions"); City of Pittsburgh v. Alco Parking Corp., 417 U.S. 369, 376 (1974) (citing "the oft-repeated principle that the judiciary should not infer a legislative attempt to exercise a forbidden power in the form of a seeming tax from the fact, alone, that the tax appears excessive or even so high as to threaten the existence of an occupation or business").

With regard to ISCRAA, it bears keeping in mind that: 1. ISCRAA on its face is a tax, and all of its provisions are adapted to the rasing of revenue. The fee formula simply determines the amount subject to the tax; the declaratory judgment provisions help to enforce the tax. 2. ISCRAA will raise more than negligible revenue. Even the 200% tax is likely to be paid in some instances – e.g., when it applies to an excess-fee payment that is marginal and minor, and the attorney is loathe to return the amount to the client. The very fact that ISCRAA will draw a revenue score will confirm its constitutional status as a tax. 3. ISCRAA does not impose a "crushing burden" on any business. Its high tax rates are marginal rates, applying only to the excessive portion of the fee. And the ISCRAA fee formula is more generous than what

federal courts award to plaintiffs' attorneys in common-fund cases involving judgments of $100 million or more.

M E M O R A N D U M

TO: Brett Kavanaugh

FROM: Joe Matal, Counsel to Senator Kyl

DATE: April 31, 2003

RE: ISCRAA and Congress's Power to Tax

Here are some legal authorities indicating that Congress has the power to apply ISCRAA's excise taxes to MSA fee income received within the last year:

First, as noted in Senator Kyl's speech, the Supreme Court has "repeatedly upheld [moderately] retroactive tax legislation against a due process challenge." United States v. Carlton, 512 U.S. 26, 30-31 (1994); *see id.* at 33 (upholding tax whose "actual retroactive effect * * * extended for a period only slightly greater than one year"). ISCRAA only taxes income received since June 1, 2002 – thus reaching back less than one year.

Second, because ISCRAA is a tax, it does not constitute a taking. As the Supreme Court made clear over a century ago, "neither is taxation for a public purpose, however great, the taking of private property for public use, in the sense of the Constitution." Mobile County v. Kimball, 102 U.S. 691, 703 (1880).

Since that time, the Supreme Court also has made clear that a tax is a tax so long as all of its provisions are adapted to the collection of revenue, and it raises at least a "negligible" amount of money. A tax is not invalid for imposing a "crushing effect" on particular businesses, and Congress's motives in imposing the tax are irrelevant. In short, "[a]s is well known, the constitutional restraints on taxing are few * * * * The remedy for excessive taxation is in the hands of Congress, not the courts." United States v. Kahriger, 345 U.S. 22, 28 (1953), overruled on other grounds, Marchetti v. United States, 88 S.Ct. 697 (1968).

The following authorities speak directly to these points:

- Sonzinsky v. United States, 300 U.S. 506 (1937), involved multiple, punitive federal taxes imposed on the sale of sawed-off shotguns, machineguns, and silencers. The party challenging the tax "insist[ed] that the present levy is not a true tax, but a penalty imposed for the purpose of suppressing traffic in a certain noxious type of firearms, the local regulation of which is reserved to the states because not granted to the national government." Id. at 512. The litigant argued that:

  > [t]he cumulative effect on the distribution of a limited class of firearms, of relatively small value, by the successive imposition of different taxes, one on the business of the importer or

> manufacturer, another on that of the dealer, and a third on the transfer to a buyer, is * * * prohibitive in effect and * * * disclose[s] unmistakably the legislative purpose to regulate rather than to tax.

The Supreme Court did not reject this characterization of the tax's effect. Instead, it simply held that:

> "[A] tax is not any the less a tax because it has a regulatory effect; and it has long been established that an Act of Congress which on its face purports to be an exercise of the taxing power is not any the less so because the tax is burdensome or tends to restrict or suppress the thing taxed.
>
> "Inquiry into the hidden motives which may move Congress to exercise a power constitutionally conferred upon it is beyond the competency of courts. They will not undertake, by collateral inquiry as to the measure of the regulatory effect of a tax, to ascribe to Congress an attempt, under the guise of taxation, to exercise another power denied by the Federal Constitution.
>
> "Here the annual tax of $200 is productive of some revenue. We are not free to speculate as to the motives which moved Congress to impose it, or as to the extent to which it may operate to restrict the activities taxed. As it is not attended by an offensive regulation, and since it operates as a tax, it is within the national taxing power."

Id. at 513-514.

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