Presidential Authority To Alter Tax Rates

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Mr. Justice Holmes is reputed to have admitted: "I like to pay taxes; with them I buy civilization."[1] In 1936 John Maynard Keynes added a startling new dimension to the way in which taxes might be used to buy civilization.[2] The great economist's theory was simple: the key is control of aggregate demand, that is, total demand for goods and services.[3] By encouraging this demand the federal government can "speed up" the economy, and by lessening the demand, it can "slow down" the economy.[4] Generally, the more a person pays in taxes the less he has to spend on goods and services; the less he pays the more he can spend. Aggregate demand presumably depends upon the availability of money to spend.[5] Applying these principles to the millions of corporate and individual taxpayers, tax rate changes can help achieve economic "stability."[6]

Although the federal government formally announced its responsibility for the nation's economic welfare ten years after Keynes introduced his theory,[7] it was not until the early 1960's that Keynesian economics found acceptance by the federal government.[8] The success of the Revenue Act of 1964[9] has proven that it can work. That Act, which accomplished the largest tax cut in history, was deliberately passed at a time when the federal budget was in a deficit. It

1. Taxation and the Economy 3 (G. Nikolaieff ed. 1968).

2. J. Keynes, The General Theory of Employment, Interest, and Money (First Harbinger ed. 1964).

3. Id.

4. "Speeding up" the economy means that the rate of production of goods and services is increased to meet the increased demand for them. When demand outpaces supply, inflation tends to result. "Slowing down" the economy means a decreasing of the effort to supply goods and services which follows from a decreased demand for them. Decreasing demand is deliberately used to combat inflation.

5. While the theory is simple, adopting it to the American economy to improve the utilization of the nation's resources so as to "buy civilization" is not simple. There is a vast amount of material on this. See, e.g., American Fiscal Policy (L. Thurow ed. 1967); Council of Economic Advisers, Annual Report (1962), in Economic Report of the President (1961-63), at 70-107; C. Hall, Fiscal Policy for Stable Growth (1960); R. Musgrave, The Theory of Public Finance (1959); R. Paul, Taxation for Prosperity (1947); Readings in Money, National Income and Stabilization Policy (W. Smith & R. Teigen ed. 1965); Subcomm. on Fiscal Policy of the Joint Economic Comm., 89th Cong., 1st Sess., Fiscal Policy Issues of the Coming Decade (Comm. Print 1965) [hereinafter cited as Subcommittee Report]; H. Wolf, Monetary and Fiscal Policy (1966).

6. "Stability" can be defined as a criterion for tax policy which is not concerned with the rate of the economy but rather is concerned with assuring a full utilization of the nation's human and material resources "under a given rate of growth in output without inflation." Sneed, The Criteria of Federal Income Tax Policy, 17 Stan. L. Rev. 567, 591 n.86 (1965).

7. This was done in the Employment Act of 1946, 15 U.S.C. §§ 1021-25 (1964); see text accompanying footnotes 62-67 infra.

8. G. Nikolaieff, supra note 1, at 4.

9. 78 Stat. 19.

directly increased the disposable income of private consumers and businesses, and raised the net return on new capital investment. This led to initial increases in consumption and expenditures by taxpayers.[10] These increases, in turn, generated further increments to consumption and investment spending, resulting in general rises in production, income and employment.[11]

When aggregate demand began to increase too rapidly, principally due to the nation's increased defense expenditures,[12] it was not surprising that President Johnson turned to taxes to achieve economic stability. The President, in his January, 1967 budget message, recommended a tax increase in the form of a surcharge.[13] A year and a half later the recommended increase was finally implemented.[14] The delay was due to Congress, which had controlled the tax rates long before anyone had thought of using them as an economic tool. As Secretary of the Treasury Fowler noted, when a tax change is necessary for fiscal reasons, "delay can be as damaging as defeat."[15]

The Commission on Money and Credit[16] had foreseen this, and in 1961 it recommended that the President be given discretionary power to make relatively short term changes in the tax rates.[17] This comment evaluates the proposal's efficacy in implementing Keynesian theory and examines its constitutionality.

I. Tax Changes Versus Expenditure Changes

In implementing its fiscal policies,[18] the Government controls two devices: tax rates and governmental expenditures. Both can be used to bring about

10. Council of Economic Advisers, Annual Report (1963), in Economic Report of the President (1961-63), at 45-52.

11. Its success has been widely acclaimed. See, e.g., American Fiscal Policy 26 (L. Thurow ed. 1967); J. Pechman, Federal Tax Policy 9 (1966). A year after the tax cut President Johnson said, "I am proud of the success of the 1964 tax cut. It proves that taxes do much more than raise revenue to finance the Government—they also affect the health and strength of the nation's economy." N.Y. Times, May 18, 1965, at 26, col. 1. A Time Magazine cover story was entitled, "We are all Keynesians Now," Time, Dec. 31, 1965, at 64.

12. See note 97 infra.

13. The Budget of the United States Government 1968, at 9 (1967).

14. Revenue and Expenditure Control Act, 82 Stat. 251 (1968).

15. Hearings on the President's 1967 Surtax Proposal Before the House Comm. on Ways and Means, 90th Cong., 1st Sess. 2 (1967).

16. The Commission on Money and Credit was established by the Committee of Economic Development, a non-profit organization of influential businessmen and educators. The Commission's report was the first thorough monetary study published in the United States since that study which culminated in the Federal Reserve System. H. Wolf, supra note 5, at 393.

17. Commission on Money and Credit, Money and Credit 137 (1961) [hereinafter cited as Commission Report].

18. Fiscal policy is only one tool which the government has for controlling the economy. The federal government can use monetary policy, which is a controlling of interest rates and the money supply. Policy makers can affect incomes by means of wage and price guideposts, the war on poverty, and unemployment compensation; they can affect labor supplies, balance of payments and other areas through a variety of devices.

deficits, surpluses, or balanced budgets which may help achieve the desired level of economic stability. A surplus in the budget acts as a depressant because less money is put into the economy by spending than is taken out by taxes; a deficit is a stimulant for the opposite reason, that more money is put into the economy than is taken out. If a surplus is called for, it can be gained by raising taxes, lowering expenditures, or both; a deficit may be achieved by lowering taxes or increasing spending.[19]

Since their recognition as fiscal tools, expenditure changes have been used more often than tax changes.[20] To those unversed in Keynes' "New Economics,"[21] countercyclical action had to be justified, at least in part, on other than pure stabilization grounds, and this could more readily be done on the expenditure side of the budget. Tax cuts in the face of a deficit would have to be explained primarily on counterrecession grounds, and thus they were not used.[22] However, since 1964, it has become widely accepted that changes in both expenditures and taxes can be justified for purely fiscal reasons.[23] Thus today a realistic choice can be made as to the use of changes in the tax rates, expenditures, or both.

Economists today have come to favor changes in the tax rates for fiscal purposes primarily for one reason: it is impossible to affect the economy by government spending changes as fast as the tax rate changes can affect it. Government expenditures are determined, generally, on the basis of long-term national needs. A cut in expenditures requires an evaluation of national priorities, which necessitates lengthy congressional hearings and discussions. An increase in government expenditures may not affect output and employment until recovery is well underway. For example, in studying the 1957-58 recession experience, two economists[24] found that the attempt by the federal government to accelerate expenditures on water-resource projects which were already under construction had essentially no effect in stimulating income when it was needed. By contrast, the effect of a tax change on private income is felt immediately and continues as long as the tax rate is maintained.[25] Moreover, it has been noted that government outlays should not exceed the point where the benefit to society of additional government spending is less than the benefit of private spending. It is improbable that this point would shift sharply in one direction or the other during such short periods as a business contraction.[26] Finally, short term changes in expenditures may often prove to be economically inefficient. Once a government program is begun, it would be wasteful to slow it down or

19. See notes 1, 2, & 5 supra.

20. W. Lewis, Federal Fiscal Policy in the Postwar Recessions 17-18 (1962).

21. Id. The term "New Economics" was originally journalese for the political economics featuring the tax cut practiced by the Kennedy-Johnson Administrations, notably under the aegis of Walter Heller, but it has come to be synonymous with Keynesian Economics.

22. W. Lewis, supra note 20, at 17.

23. See note 11 supra.

24. Ando & Brown, Lags in Fiscal Policy, in Stabilization Policies 147 (1963).

25. J. Pechman, supra note 11, at 14.

26. Id. at 13-14.

discontinue it in the interest of reducing aggregate spending. Similarly, pumping more money into a program than was originally called for, merely to increase aggregate spending, would usually be inefficient.[27] The one advantage which changes in expenditures have over tax changes is that the former have a larger "multiplier effect";[28] but this advantage has not made expenditure changes more suitable for stabilization purposes, because of the uncertain results attending the multiplier effect.

Tax changes for fiscal purposes thus appear preferable, but to maximize this preferability the changes must be fast and flexible. Although tax changes can be made much faster than expenditure changes it still has been frequently alleged that the time actually required by Congress to enact tax changes rules out such changes as a desirable means of stabilizing action.[29]

II. Inadequacies of the Tax Legislative Process

While Congress has the power to "lay and collect"[30] taxes, most tax proposals originate with the President.[31] Actual work on any tax bill begins months before the President recommends it to Congress.[32] The Treasury Department has the overall responsibility for the huge amount of preparation that precedes the President's tax recommendations.[33] The President's Council of Economic Advisers and the Bureau of the Budget formulate the major features of any proposed tax bill. Decisions on the more technical tax questions in proposed legislation are usually made in the Treasury Department. Various experts are then consulted either individually or in groups to narrow the range of feasible alternatives. At all stages the Secretary of the Treasury is aware of the progress

27. Teigen, The Effectiveness of Public Works as a Stabilization Device, in Readings in Money, National Income and Stabilization Policy 302, 304-05 (1965).

28. H. Wolf, supra note 5, at 338 describes this effect as follows: "Government expenditures financed by a deficit are the most potent insofar as stimulating the economy is concerned. This is because of the multiplier. A given increase in government demand superimposed on private demand creates an increase in income of a like amount. This, in turn, is in part consumed and in part saved. The part consumed becomes income for somebody, and the process is repeated until the increase in income . . . is equal to the sum of the increased expenditures." The formula is cited in W. Lewis, supra note 20, at 69 n.4 as follows: "The multiplier is equal to $\frac{1}{1 - bc}$, where b is the fraction of a change in GNP that appears in disposable income and c is the marginal propensity to consume disposable income." See also Sneed, The Criteria of Federal Income Tax Policy, 17 Stan. L. Rev. 567, 590-94 (1965).

29. Commission Report at 131.

30. U.S. Const. art. I, § 8.

31. R. Blough, The Federal Taxing Process 92 (1952); H. Wolf, supra note 5, at 324. Besides the power to veto congressional legislation, the Constitution expressly provides that the President "shall from time to time give to the Congress Information of the State of the Union, and recommend to their Consideration such Measures as he shall judge necessary and expedient . . . ." U.S. Const. art. II, § 3.

32. J. Pechman, supra note 11, at 34.

33. R. Blough, supra note 31, at 94.

of a tax bill and he alone makes the final decision on the program that is submitted to the President.[34] Disclosure of a major tax program by the President signals the beginning of public debate, and various political, social, and economic groups start applying pressure toward the position most advantageous to them.[35] At this point the President brings his proposal formally to the attention of Congress through a message or speech or the intervention of his Secretary of the Treasury.[36]

Congress then takes over, applying its system of committees, subcommittees, conferences and often extensive hearings to the bill recommended by the President. As interest groups pressure the legislators the internal politics of Congress can adversely affect the bill's chances of passage within a reasonable time.

The tax legislative process has been criticized by numerous congressional committees, political scientists, tax students and professionals.[37] The common criticisms are that the whole process is unduly influenced by high pressure special interest groups who by nature do not speak in the national interest, and that the tax legislative process restricts the possibilities of using tax action for countercyclical purposes, since the process cannot be relied upon to provide a prompt stimulus or restraint to the economy when it is most needed.[38] Further legislative control over the fiscal policies of the federal government is now divided between the appropriations committees and the tax committees, resulting in congressional inability to make decisions about the size of the budget in relation to total taxes collected, or whether economic conditions warrant a surplus or deficit and how large the surplus or deficit should be.[39]

Recent federal tax bills are cogent examples of the slowness of the tax legislative process. For example, the Federal Aid Highway Act of 1956 was bogged down in the process for sixteen months; the Revenue Act of 1962 was enacted after twenty-two months of involvement in the process; the Revenue Act of 1964 took thirteen months before its final enactment.[40]

The most recent major tax legislation was the 1968 surcharge.[41] In its 1967 annual report, [42] the Council of Economic Advisers investigated the problems of restraining an economy where demand threatened to exceed productive capacities. The Council reviewed the developments since the acceleration in demand in mid-1965, in the steps already taken to keep demand under control, and the steps planned for fiscal 1968. Based on a $12 billion increase in federal pur-

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34. J. Pechman, supra note 11, at 34.

35. Id. at 35.

36. R. Blough, supra note 31, at 114-18.

37. J. Pechman, supra note 11, at 43 and material cited in bibliography at 301-02.

38. Huitt, Congressional Organization and Operations in the Field of Money and Credit, in Fiscal and Debt Management Policies 399 (1963).

39. J. Pechman, supra note 11, at 45-47.

40. Id. at 32.

41. Revenue and Expenditure Control Act of 1968, 82 Stat. 251 (codified in scattered sections of 5, 26, 31, 42 U.S.C.).

42. Council of Economic Advisers, Annual Report, in Economic Report of the President 1967.

chases of goods and services and the prospects for the other sectors of the economy, the President recommended a six percent surcharge on personal and corporate income tax liabilities.[43] However, Wilbur Mills, Chairman of the House Ways and Means Committee, concluded that the administration would have to cut back on expenditures before he would allow his committee to report the bill out.[44] The White House then abandoned its recommendation until August 3, 1967, when President Johnson asked for an increased surcharge of ten percent, at the same time revealing that the deficit for 1968 could exceed $29 billion and produce a ruinous spiral inflation. With this second presidential recommendation there began an agonizing contest of wills between President Johnson and Congress, which illustrates how politics can frustrate the best-laid economic plans.[45] The President, in support of his tax surcharge, could cite the opinions of an overwhelming majority of American business leaders and of the country's leading economists,[46] but for months Congress refused to pass on the surcharge. The extended debate over this tax increase further points out the need for reform in the antiquated and clumsy process of enacting tax legislation.

III. The Commission's Proposal

The most important proposal to grant the President power to change tax rates was made in 1961 by the Commission on Money and Credit. The Commission recommended, in part:

> In order to provide maximum flexibility for stabilizing tax changes, the Commission recommends that Congress grant to the President limited conditional power to make temporary countercyclical adjustments in the first-bracket rate of the personal income tax, the grant to be accompanied by the following qualifications and safeguards:
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> a. The power should be available for exercise only when the President has issued a statement that in his judgement economic conditions are running significantly counter to the objectives set forth in the Employment Act as amended . . . .
>
> b. The range of permissible adjustment should be limited to 5 percentage points upward or downward, that is, one-quarter of the present 20 percent rate.
>
> c. The duration of the adjustment should be limited to six months subject to renewal by the same process, unless Congress acts sooner by law to extend or supplant it.
>
> d. The exercise of the conditional power by the President should be subject to a legislative veto by a concurrent resolution of both houses of Congress before any tax adjustment takes effect, in accordance with the procedures made familiar by the recent Reorganization Acts. To this end the President should be required to lay before the Congress any proposal to adjust the tax rate, the proposal to lie there up to 60 days, unless a concurrent resolution of disapproval is sooner voted on and rejected, and to take effect only if no such resolution is adopted in that time. In the same law that authorizes the adjustment, the parliamentary rules of the two houses should be

43. See note 9 supra.

44. Elson, How the Old Politics Swamped the New Economics, Fortune, Sept. 1, 1968, at 75, 168.

45. Id. at 169.

46. Hearings on the President's 1967 Tax Proposals Before the House Comm. on Ways and Means, 90th Cong., 1st Sess. pt. 1 (1967).

amended ad hoc in a manner to ensure that a concurrent resolution of disapproval may be introduced and voted upon within a 60-day period.[47]

This proposal was quickly adopted by President Kennedy. He urged Congress "to equip the Government to act more promptly, more flexibly, and more forcefully to stabilize the economy" by enacting what were essentially the Commission's recommendations.[48] The President's bill was limited to tax reductions, and it added that, if Congress were not in session, a presidentially proposed tax adjustment would automatically take effect but would terminate thirty days after Congress reconvened. Extension would then require a new proposal by the President according to the Commission's procedure.[49]

The President's proposal received wide initial support[50] but it was shelved by Congress largely because it felt that the granting of such discretionary powers to the executive would pre-empt congressional responsibilities.[51] This attitude on the part of some members of Congress resulted from a failure to appreciate that fiscal changes for stabilization purposes, which are only temporary and reversible, must be distinguished from permanent and structural changes in the tax laws.[52]

Since Kennedy's proposal in 1962 a great deal of progress has been made toward a better understanding of fiscal policy.[53] In the fall of 1964 the Subcommittee on Fiscal Policy of the Joint Economic Committee invited comments from leading economists on important fiscal policy issues likely to come before Congress in the coming decade.[54] Virtually every economist was concerned with improving the flexibility and speed of the process by which tax rates are altered. Many indicated that some procedure should be established whereby the President could initiate temporary changes in the tax rates when economic conditions seemed to call for such action.[55]

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47. Commission Report at 137.

48. Economic Report of the President 18 (1962).

49. Id.

50. The reaction to the proposal is outlined in Note, Tax Adjustments for Economic Stability and Growth: Proposals for Reform of The Legislative Process, 5 Harv. J. Legis. 265, 273-75 (1968).

51. Subcommittee Report at 100 (Statement by Joseph A. Pechman).

52. See Commission Report at 132. The Commission for Money and Credit called for a "sharp demarcation between short-run cyclical changes and long-run structural changes." Id. Chairman of the House Ways and Means Committee, Wilbur Mills, apparently failed to appreciate the need for this distinction. He believed that the two should be given the same treatment and that the President is not capable of hearing all the various persons and organizations which traditionally have an interest in tax changes. "I don't know any place in the White House where the President could have a hearing room big enough to hear those who would want to discuss increases in taxes." Time, Feb. 21, 1969, at 16.

53. See note 5, supra.

54. See Subcommittee Report at 1.

55. Subcommittee Report at 56 (statements by R. Goode); Id. at 74 (statements by N. Keiser); Id. at 99 (statements by J. Pechman; Id. at 126 (statements by W. Smith); Id at 140 (statements by J. Tobin); Id. at 151 (statements by M. White).

In 1966, when it began to appear that the nation was entering into an inflationary cycle because of the war in Vietnam, Representative Moorhead foresaw the difficulties involved in getting a tax increase enacted. He introduced a bill which would have authorized the President, during the period when Congress is adjourned *sine die*, to *increase* on a temporary basis individual and corporate taxes up to five percent.[56] Kennedy's bill called for authority to *decrease* taxes because, according to his chief economic advisor, this would avoid constitutional problems inasmuch as the President would merely be suspending rates already set by Congress rather than establishing new rates under a delegated power.[57] Moorhead did not see a constitutional problem in authorizing the President to raise taxes. He noted that Kennedy's proposal to decrease tax rates was not looked upon favorably by Congress because it would have granted to the executive branch the opportunity to usurp political power by granting a popular tax decrease, while his bill did just the opposite. "It imposes on the Executive, the onus for imposing a politically unpopular tax increase."[58] Congress adjourned without considering Moorhead's bill.

IV. Presidential Administration of the Discretionary Power

The doctrine of separation of powers has resulted in "coordination difficulties" among the many institutions of national government participating in the formulation and administration of economic policies.[59] Congress has always had the ultimate legislative power over economic policy, but central responsibility for the nation's economic well-being has devolved upon the President. For the most part, Congress acts by reacting. It functions well in responding to, restraining, and, at times, goading presidential leadership in economic policy matters. Thus it is probable that fiscal policy decisions in the future will continue to originate in the executive branch whether the President is given discretionary power or not, because only the President's jurisdiction has come to be extensive enough to coordinate fiscal planning.[60] Practically, American experience has led the people to expect the President to mobilize support for

56. See 112 Cong. Rec. 16,890-91 (1966). The bill reads in pertinent part as follows: "Section 1. Authority of President To Increase Certain Tax Rates Temporarily. (a) Proclamation by President of Increase.—If, during the period after the adjournment sine die for the second session of the Eighty-ninth Congress of both Houses of Congress and before the convening of the Ninetieth Congress, the President determines that an increase in Federal income tax and withholding rates is necessary in the national interest, he may during such period publish in the Federal Register a proclamation setting forth a tax increase factor, the withholding tables described in section 3(a), and the pay periods to which such tables are applicable. (b) Tax Increase Factor.—For purposes of this Act, the term 'tax increase factor' means a number, greater than zero but not greater than 0.05, by which each of certain income taxes are multiplied in order to determine the amount of increase in tax imposed during a period for which section 2 applies."

57. Note, supra note 50, at 276 n.59.

58. 112 Cong. Rec. 16,890 (1966) (remarks of Representative Moorhead).

59. Commission Report at 259-82.

60. Id. at 264.

policies related to the needs of the entire nation, including national economic planning.[61]

The Constitution has given the President powers to accompany his responsibilities over military and foreign policy, thus the administration of these policies can be coordinated. Coordination in economic policy matters is not so well established, so assuming the President is granted the power to alter tax rates, what standards should measure his administration of this power? Legislation in effect for two decades suggests a solution to this question. Besides setting out national goals, the Employment Act[62] requires the President to issue an annual Economic Report to Congress. To help prepare this report the Act furnishes the President a staff agency, the Council of Economic Advisers, which since 1946 has played an increasingly important role in managing the nation's economy. Its influence is expected to grow.[63] The role has been one of policy formulation—a source of ideas and information rather than a force in execution.[64] In its advisory role, the Council has established working relations with not only the White House but with the Bureau of the Budget, the Treasury Department, the Federal Reserve Board, and the other executive departments and agencies active in various economic policy roles. Moreover, the Council has come to work closely with its legislative counterpart, the Joint Economic Committee. The Council, in short, has become a link between those areas of the legislative and executive branches which are involved in the taxing process and at the same time "[i]t has become the institutional embodiment of the President's responsibility for the nation's economic welfare and of his initiative in behalf of economic growth."[65] Moreover, according to a leading student of the Council's role, the Council has been most successful where it has focused its attention on strictly economic problems, such as recession or inflation.[66] Thus, the Chief Executive presently has at his disposal what could be the means for determining "that in his judgement economic conditions are running significantly counter to the objectives set forth in the Employment Act" as the Commission proposal required.[67]

V. Constitutionality of the Proposal

Can Congress constitutionally delegate to the President the power to alter tax rates? Senator Harry L. Byrd, Chairman of the Senate Committee on Finance, stated that President Kennedy's proposed tax-reduction authority was "'in fundamental violation of the Constitution.'"[68] The Senator might have

61. See, e.g., G. McConnell, Private Power & American Democracy (1966).

62. 15 U.S.C. §§ 1021-25 (1964).

63. E. Flash, Economic Advice and Presidential Leadership (1965).

64. Id. at 276.

65. Flash, The Broadening Scope of the President's Economic Advice, 35 Geo. Wash. L. Rev. 286, 292 (1966).

66. Id. at 294.

67. Commission Report at 137. The Commission suggests that the Council of Economic Advisors be the core for a larger advisory board. Id. at 276-77.

68. N.Y. Times, Jan. 12, 1962, § 1, at 14, col. 1. Three members of the Commission on

reached the conclusion after calling to mind the provisions in the Constitution that "[t]he Congress shall have Power To lay and collect Taxes"[69] and "[a]ll legislative Powers herein granted shall be vested in a Congress of the United States . . . ."[70]

The delegation of legislative power is less controversial today than it was during the first third of the twentieth century. Then, a corollary to the doctrine of separation of powers, deeply imbedded in American constitutional history, was Locke's maxim: "The legislative [sic] cannot transfer the power of making laws to any other hands, for it being but a delegated power from the people, they who have it cannot pass it over to others."[71] Despite Locke's great influence upon the nation's constitutional framework, it was seen at an early time that the maxim was fallible.[72] In fact, there have been only two cases where the Supreme Court has struck down delegations to executive agencies.[73] In *Panama Refining Co. v. Ryan*,[74] and in *A.L.A. Schechter Poultry Corp. v. United States*,[75] the Court found the principal congressional response

Money and Credit dissented from the Commission's proposal stating that they were opposed because the recommendation "tend[s] to undermine the basic essential checks and balances in our federal government . . . ." Commission Report at 137-38.

69. U.S. Const. art. I, § 8.

70. U.S. Const. art. I, § 1.

71. J. Locke, An Essay Concerning the True Origin, Extent and End of Civil Government, in Of Civil Government 189 (1924). The origin and early history of the maxim was traced in Duff and Whiteside, Delegata Potestas Non Potest Delegari: A Maxim of American Constitutional Law, 14 Cornell L.Q. 168 (1929). The authors show that the doctrine, introduced by Lord Coke, received the great Judge's approval because of a misprint in Bracton. The maxim "which was to serve the turn of Coke, to command the respect of Kent and Story, and to leave its mark on the constitutional history of the United States, owes . . . its vogue in the common law to the carelessness of a sixteenth century printer." Id. at 173.

72. The Cargo of The Brig Aurora v. United States, 11 U.S. (7 Cranch.) 583 (1813).

73. A delegation by Congress, not to an executive agency, but to a private group of coal producers and workers was held invalid in Carter v. Carter Coal Co., 298 U.S. 238 (1936).

74. 293 U.S. 388 (1935). In this case the Court was concerned with the Act's delegation to the executive branch of the power to prohibit interstate shipment of oil produced in excess of state-determined quotas. Although no rule defined when the delegated power was to be exercised, the government argued that the power presumably was exercised to carry out the stated policy of the legislature and this was the necessary standard. Chief Justice Hughes found the statute contained inconsistent directions and noted that it spoke of conserving natural resources but "prescribes no policy for the achievement of that end." Id. at 418.

75. 295 U.S. 495 (1935). This case involved a sweeping congressional delegation. In this case the Court agreed unanimously that the power to formulate codes of "fair competition" for all industry in order to promote "the policy of this title" was an unconstitutional delegation. Condemning the statute in a concurring opinion, Justice Cardozo, who had dissented in Panama, said that a code may "include whatever ordinances may be desirable or helpful for the well-being or prosperity of the industry affected." Id. at 552-53. But, said the Justice, the N.I.R.A. "sets up a comprehensive body of rules to

to the Depression, the National Industrial Recovery Act,[76] unconstitutional. Prior to these decisions some very broad standards had been upheld[77] and it was thought that the doctrine of delegation was no longer an issue hindering congressional conferrals of authority upon the executive branch.[78] Today there is again a consensus[79] that the delegation objection is merely academic, for it is now apparent that the broadest delegations will be upheld if they are accompanied by standards capable of reasonable certainty and legal definition.[80]

VI. Conclusion

The Employment Act of 1946[81] committed the federal government to the use of "all practical means" to achieve the maximum utilization of the nation's resources. Tax rate changes have proven to be one of the most successful tools for implementation of national fiscal policy. Unfortunately, this tool has been bridled by a time-consuming legislative process which can greatly reduce its

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promote the welfare of the industry, if not the welfare of the nation, without reference to standards . . . that could be known or predicted in advance of its adoption." Id. at 553.

76. Ch. 90, 48 Stat. 195 (1933).

77. See, e.g., Federal Radio Comm'n v. Nelson Bros. Bond & Mortgage Co., 289 U.S. 266, 285 (1933) ("public convenience, interest or necessity"); United States v. Shreveport Grain & Elevator Co., 287 U.S. 77, 85 (1932) ("reasonable variations"); New York Cent. Sec. Corp. v. United States, 287 U.S. 12, 24 (1932) ("public interest"); Tagg Bros. & Moorhead v. United States, 280 U.S. 420, 435 n.3 (1930) ("just and reasonable"); FTC v. Gratz, 253 U.S. 421, 425 (1920) ("unfair methods of competition"); see Cousens, The Delegation Of Federal Legislative Power To Executive Officials, 33 Mich. L. Rev. 512, 512-38 (1935). The rule that there must be a standard to guide the administration in its rule-making was first extricated by Chief Justice Taft in Mahler v. Eby, 264 U.S. 32 (1924). In this case the President's delegated authority to deport "undesirable aliens" was questioned. The Chief Justice noted that there were past statutes defining this term and so "[o]ur history has created a common understanding of the words . . . which gives them the quality of a recognized standard." Id. at 40.

78. See J. Comer, Legislative Functions of National Administrative Authorities 121 (1927).

79. According to Professor Jaffe, the Panama case should have been upheld, and probably would have been, if the Court had not been eager to chastise the New Deal's failings. Jaffe, An Essay on Delegation of Legislative Powers: II, 47 Colum. L. Rev. 561, 573 (1947); see K. Davis, Administrative Law Text § 2.04 (1959) [hereinafter cited as K. Davis]. Since Panama and Schechter, some very loose standards have been allowed. See, e.g., American Power & Light Co. v. SEC, 329 U.S. 90, 96 (1946) ("unduly or unnecessarily" complicated the structure of a holding company system or "unfairly or inequitably distributed voting power among the security holders"); National Broadcasting Co. v. United States, 319 U.S. 190, 227 (1943) ("public interest, convenience, or necessity"). At least one Justice has written that the Schechter case has been overruled. Yakus v. United States, 321 U.S. 414, 452 (1944) (Roberts, J., dissenting).

80. Yakus v. United States, 321 U.S. 414 (1944); National Broadcasting Co. v. United States, 319 U.S. 190 (1943); Sunshine Anthracite Coal Co. v. Adkins, 310 U.S. 381 (1940); United States v. Rock Royal Co-operative, Inc., 307 U.S. 533 (1939); Mulford v. Smith, 307 U.S. 38 (1939); Currin v. Wallace, 306 U.S. 1 (1939).

81. 15 U.S.C. § 1021 (1964).

efficacy in stabilizing short term economic cycles. The most desirable way to speed such changes is to grant the President the power to make them, subject to the limitations set forth in the commission's proposals. Any abuses of this power by the President could easily be checked by Congress. Indeed, rivalry between the two branches may be an incentive for Congress to be more responsive to the economic demands of the nation as a whole in its process of tax legislating. The Constitution does not prohibit the type of delegation recommended by the Commission on Money and Credit. The greatest obstacles are a historical aversion to innovation where the balance of powers is likely to be altered, and the congressional unwillingness to part with any of its politically explosive taxing powers. It is hoped that in the face of logic these obstacles will not be insurmountable. It is not necessary that Congress supply administrative officials with a specific formula for their guidance, particularly where, as in economic matters, flexibility is of the essence. "Standards prescribed by Congress are to be read in the light of the conditions to which they are to be applied."[82] The Supreme Court has specifically recognized that the legislative process involving complex economic and social problems would, in fact, frequently bog down if Congress were constitutionally required to appraise beforehand the myriad situations to which it wishes a particular policy applied and to formulate specific rules for each situation.[83]

Indeed, Professor Davis contends that "[d]elegations without standards have often been upheld."[84] He takes the holding in *Fahey v. Mallonee*[85] to be a clearcut denial of the proposition that Congress must state a standard, a general policy or an intelligible principle.[86] This case involved section 5(d) of the Home Owners' Loan Act of 1933[87] which authorized the Federal Loan Bank Board to prescribe, by regulations, the terms and conditions upon which a conservator might be appointed for a federal savings and loan association. The Board appointed a conservator for such an association, alleging that it was conducting its affairs in a manner which jeopardized the interests of its members, its creditors and the public in general.[88] The association brought an action to have the conservator ousted, claiming that section 5(d) contained a delegation without any standards. The district court, relying upon *Schechter* and *Panama*, held the section to be an unconstitutional delegation.[89] The Supreme Court reversed, admitting that there were no "explicit standards" to assure responsible administration.[90] To distinguish *Panama* and *Schechter*, the Court reasoned

82. Lichter v. United States, 334 U.S. 742, 785 (1948).

83. American Power & Light Co. v. SEC, 329 U.S. 90, 105 (1946). See also Sperry v. Florida, 373 U.S. 379 (1963) (loose standard held sufficient where patents involved).

84. K. Davis § 2.04.

85. 332 U.S. 245 (1947). The Supreme Court recently cited this case with approval in Sperry v. Florida, 373 U.S. 379 (1963).

86. K. Davis § 2.04.

87. 12 U.S.C. § 1464(d) (1964).

88. 332 U.S. at 247.

89. 68 F. Supp. 418, 420 (S.D. Cal. 1946).

90. 332 U.S. at 250.

that, while wide discretion may be permissible in a field which has a history of regulation and close supervision such as banking, it might not be constitutionally permissible to authorize such broad discretion in "uncharted fields" as was attempted by the N.I.R.A.[91] Closely akin to this reasoning is a recent statement by Justice Brennan which indicates another area where standards are needed. "Congress ordinarily may delegate power under broad standards. . . . Delegation of power under general directives is an inevitable consequence of our complex society, with its myriad, ever changing, highly technical problems. . . . The area of permissible indefiniteness narrows, however, when the regulation invokes criminal sanctions and potentially affects fundamental rights. . . ."[92]

Since use of tax changes to achieve economic stability is itself a new concept,[93] it would seem that some standards will be necessary to sustain the constitutionality of the proposed delegation. Indeed, no one has suggested that the President be given an unbridled authority to alter the tax rates.[94]

In determining the constitutional boundaries of presidential discretion to alter tax rates, the authority delegated to the President to alter tariff rates presents some analogous case law. The reasoning in many tariff cases is based on the principle, enunciated in *United States v. Curtiss-Wright Export Corp.*,[95] that the President has traditionally been given "a degree of discretion and freedom from statutory restriction which would not be admissible were domestic affairs alone involved."[96] Because of the position of the United States as a leading

91. Id.

92. United States v. Robel, 389 U.S. 258, 274-75 (1967) (concurring opinion). In this case the Court held a section of the Subversive Activities Control Act violative of the defendant's first amendment right of freedom of association. Defendant, a member of the Communist Party, had been employed as a mechanic in a shipyard which was designated as a "defense facility" by the Secretary of Defense in accordance with the Subversive Activities Control Act; he was indicted for violating the Act's prohibition against a registered Communist working in a "defense facility." Chief Justice Warren for the majority used the overbreadth doctrine to strike down the statute, 389 U.S. at 262, but Justice Brennan concurred in the result because he found that the statute did not contain adequate standards to define "defense facility." The majority opinion in a footnote said that because "we agree that the statute is contrary to the First Amendment, we find it unnecessary to consider [whether the statute contains an unconstitutional delegation of legislative power]." 389 U.S. at 261 n.5. Justice White stated that he would uphold the delegation and cited Yakus v. United States, 389 U.S. at 288-89 n.2. It probably can be concluded from the opinions in this case that standards still are required by the Court and the delegated powers will be scrutinized when individual rights are affected. See United States v. Laub, 385 U.S. 475 (1967); Kent v. Dulles, 357 U.S. 116 (1958).

93. Int. Rev. Code of 1954, § 891 allows for a limited delegation to the President to double certain tax rates of citizens and corporations of foreign countries whenever he "finds that, under the laws of any foreign country, citizens or corporations of the United States are being subjected to discriminatory or extraterritorial taxes . . . ."

94. Moorhead's bill offered a very broad standard—"the national interest." See note 56 supra.

95. 299 U.S. 304 (1936).

96. Id. at 320.

world power, the dichotomy between domestic and foreign affairs tends to become hazy. Presidential discretion over tax rates would have, at least indirectly, as many foreign policy implications as does his discretion over tariffs. Indeed, the balance of payments deficit was a key consideration behind the 1968 surcharge,[97] and Kennedy's call for a tax cut in 1963.[98] Tangentially, it is also hard to distinguish the rationale behind the presidential power to alter taxes from the broad powers which the President has to cope with the balance of payments problem. For example, on January 1, 1968, President Johnson announced far-ranging balance of payments measures which imposed heavy restrictions on future investment by American corporations overseas and required repatriation of certain post-January 1, 1968 earnings. The Department of Commerce immediately promulgated regulations which have the force of law. To the extent that earnings of an affiliate must be patriatized by returning them to the American corporation, they are fully taxable as dividend income. What the executive branch did, in short, was raise the corporate tax rates for certain corporations by executive order. This was done for what were essentially fiscal policy reasons.[99] It is not unreasonable to conclude, therefore, that the *Curtiss-Wright* distinction in tax law is not as powerful an argument as it may have been in the past.[100]

The first case involving the doctrine of delegation was itself a tariff case. In 1809 Congress laid an embargo on French and British shipping which was to last a year unless the President proclaimed that either France or England had violated the neutral commerce of the United States. To the allegation that Congress had "transferred" its power, the Supreme Court in the *Brig Aurora*[101] case stated that it saw no reason why the legislature should not exercise its authority indirectly through the President. It was not until 1892 that the Court was again confronted with a delegation problem in connection with a tariff. In *Field v. Clark*,[102] the Court upheld a law which gave the president the power to

97. For the foreign policy considerations involved in the passage of the 1968 Surcharge, see Hearings on the Administration's Balance-of-Payments Proposals Before the House Comm. on Ways and Means, 90th Cong., 2d Sess. (1968).

98. President's Tax Message, Jan. 24, 1963, H.R. Doc. No. 43, 88th Cong., 1st Sess. 4 (1963), quoted in Slowinski, Federal Taxation and Foreign Policy, 20 U. Fla. L. Rev. 489, 496 n.41 (1968).

99. Id. at 499-503.

100. It should be noted that the Curtiss-Wright dichotomy between executive authority in domestic and foreign affairs was drawn in 1936, immediately after the Schechter and Panama decisions, when such a dichotomy was necessary to sustain the powers granted in Curtiss-Wright and not be inconsistent with Schechter and Panama. See J. Steiner & D. Vagts, Transnational Legal Problems 94-95 (1968).

101. 11 U.S. (7 Cranch.) 583 (1813).

102. 143 U.S. 649 (1892). In upholding the statute, Justice Harlan uttered a dictum which was to have considerable influence up through the mid-Depression years: "That Congress cannot delegate legislative power to the President is a principle universally recognized as vital to the integrity and maintenance of the system of government ordained by the Constitution. . . . Nothing involving the expediency or the just operation of such legislation was left to the determination of the President. . . . He was the mere agent of

remove from the free list products from a country where he "shall be satisfied" that its government imposes duties on American products which he deems to be " 'reciprocally unequal and unreasonable.' "[103]

Probably the leading delegation case involving a tariff is *J.W. Hampton, Jr. & Co. v. United States*,[104] where the Flexible Tariff Act of 1922[105] was unsuccessfully challenged. It authorized the President to adjust tariff rates up to 50 percent where he found that current rates did not "equalize . . . differences in costs of production in the United States and the principal competing country. . . ."[106] The President was thus given the power to make a new tariff rate and to repeal an old rate. According to Professor Jaffe, both the act's general policy and its history of administration showed a wide scope for manipulation.[107] Furthermore, its administration was entirely dependent on presidential initiative, for the President was free to ignore the Tariff Commission's findings. Chief Justice Taft chose this case to elaborate upon his principle enunciated in *Mahler v. Eby*,[108] that there must be recognized standards provided by Congress to guide administrative officials. The Chief Justice stated: "If Congress shall lay down by legislative act an intelligible principle to which the person or body authorized to fix such rates is directed to conform, such legislative action is not a forbidden delegation of legislative power."[109]

Since the *Hampton* decision, there has only been one reported case challenging the President's delegated authority to alter tariff rates. In *Star-Kist Foods, Inc. v. United States*,[110] an assessment made on imported tuna fish at a rate set by the President pursuant to the authority delegated to him by the Trade Agreement Act of 1934[111] was upheld. The Act provided that presidential power can be invoked "whenever [the President] finds as a fact that any existing

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the law-making department to ascertain and declare the event upon which its expressed will was to take effect." Id. at 692-93. This dictum introduced to the federal courts the so-called "non-delegation" doctrine. K. Davis § 2.02. The Supreme Court was to sustain scores of delegations without admitting that a delegation was made. This inconsistency was reconciled by drawing a theoretical distinction between the power to make laws and a subsidiary power to fill in the details or to find facts to carry the congressionally declared policies into effect. See, e.g., United States v. Shreveport Grain & Elevator Co., 287 U.S. 77 (1932); United States v. Grimaud, 220 U.S. 506 (1911). Professor Jaffe has called this attempted reconciliation a "hopelessly fictional rationalization." Jaffe, An Essay on Delegation of Legislative Power: II, 47 Colum. L. Rev. 561 (1947). Davis is similarly critical. K. Davis § 2.02. In 1957 the Supreme Court clearly rejected this rationalization. United States v. Howard, 351 U.S. 212 (1957).

103. 143 U.S. at 699. (Lamar & Fuller, J.J.) (concurring opinion).

104. 276 U.S. 394 (1928).

105. Act of Sept. 21, 1922, ch. 356, § 1, 42 Stat. 858.

106. Id. § 315 at 941-42.

107. Jaffe, An Essay on Delegation of Legislative Power: I, 47 Colum. L. Rev. 359, 361 n.11 (1947).

108. 264 U.S. 32 (1924).

109. 276 U.S. at 409.

110. 275 F.2d 472 (C.C.P.A. 1959).

111. 19 U.S.C. § 1351 (1964).

duties or other import restrictions of the United States or any foreign country are unduly burdening and restricting the foreign trade of the United States and that the purpose [of the Act] will be promoted . . . ."[112] The case did not reach the Supreme Court. During most of America's past, while tariffs exceeded taxes as sources of revenue to the Government, the Court sustained sweeping delegations to the President to alter tariff rates.

Finally, the argument that tariff cases can be used as precedent for allowing a delegation of congressional power to tax is supported by an interesting tax collection case. In *United States v. Tishman*,[113] the Seventh Circuit expressly followed *Field v. Clark* in sustaining an act which delegated to the Tax Commissioner the authority to determine when a tax return must be filed where distilled spirits are involved.

It should be noted that the Constitution confers the power to lay taxes and make tariffs in the same clause: "The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises . . . ."[114] Also, the Constitution confers upon Congress the power to "lay and *collect*" taxes.[115] No one could claim that the Founding Fathers intended that Congress should not delegate the power to collect taxes. It might be argued that the fact that it was not deemed necessary to treat the collection and laying of taxes separately was due to the fact that they did not intend to prohibit a delegation of either power. Delegation was not discussed at the Constitutional Convention, except when a motion by Madison that the President be expressly given the power to execute such powers as may be delegated by Congress was defeated as unnecessary.[116]

The analogy to tariff cases, as well as the wording of the Constitution itself, thus suggests that the standards for a delegation of tax rate discretion to the President which may be constitutionally required are, at least, satisfied by the standards already set forth in the Employment Act of 1946.[117] This Act declared that "it is the continuing policy and responsibility of the Federal Government to use all practicable means consistent with its needs and obligations and other essential considerations of national policy . . . to promote maximum employment, production, and purchasing power."[118] Consequently, the Commission's proposal sets forth three standards upon which a decision to alter taxes must be based. A tax change must promote maximum: (1) employment, (2) production, and (3) purchasing power. While price stability is not an express goal of the Employment Act, section 2 of the Act directs the federal government to achieve its express objectives by means which are "consistent with . . . other essential

112. Id. § 1351(a)(1).
113. 99 F.2d 951 (7th Cir. 1938), cert. denied, 306 U.S. 636 (1939).
114. U.S. Const. art. I, § 8.
115. Id. (emphasis added).
116. K. Davis § 2.02, at 33 (emphasis added).
117. 15 U.S.C. § 1021 (1964).
118. Id.

considerations of national policy." Since 1946, price stability has been an essential consideration of national policy.[119]

The four concepts of maximum employment, production, purchasing power, and price stability thus offer standards which should be constitutionally adequate. They would seem capable of legal definition and reasonable certainty, having been formally recognized as national goals for over twenty years.[120] Any other constitutional objection to the proposed delegation would appear to be obviated by the Commission's recommendation that Congress retain a veto by concurrent resolution of both houses.[121] Hence, there can be no claim of a legislative "abdication" of its responsibilities.[122]

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119. Auerbach, Presidential Administration of Prices and Wages, 35 Geo. Wash. L. Rev. 191, 193 (1966). The Commission on Money and Credit recommended that price stability be put into the Employment Act as an objective. Commission Report at 263-64.

120. See text accompanying notes 71-80 supra.

121. Commission Report at 137.

122. Jaffe, supra note 107, at 366-76.