TAXING OTHERS IN THE AGE OF TRUMP: FOREIGNERS (AND THE POLITICALLY WEAK) AS TAX SUBJECTS[1]

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INTRODUCTION

Supporting a tax increase during the past couple of decades might sound the death knell for the career of a U.S. politician. Some attribute George H. W. Bush's presidential reelection campaign loss to violation of his "no new taxes" pledge.[2] Conflicting with the political toxicity of new taxes and tax increases is the relentless demand for revenue to operate government and fund the fulfillment of campaign promises. The fiscal discipline to eliminate the need for revenue increase rarely accompanies the political rhetoric committing to decrease taxes and never increase them again. For many politicians, the funding issue becomes a matter of decreasing funding for programs the politician disfavors and using the decreased funding for programs the politician favors.[3]

These conflicting goals of funding spending programs while reducing (or at least not increasing) taxes have encouraged development of "non-tax" revenue sources. User fees for governmental services that previously had been free or low-cost have proliferated.[4] Law enforcement agencies routinely use property

1. An earlier draft of this Article was presented at the Sanford E. Sarasohn Conference on Critical Issues in International and Comparative Taxation II: Taxation and Migration (Saint Louis University School of Law, Mar. 31, 2017) ("Sarasohn Conference").

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2. *Top 10 Unfortunate Political One-Liners: George H.W. Bush*, TIME, http://content.time.com/time/specials/packages/article/0,28804,1859513_1859526_1859516,00.html [https://perma.cc/3UL6-9E6R]. Bush lost to Clinton in 1992. Andrew Rosenthal, *THE 1992 CAMPAIGN: White House; Bush Says Raising Taxes Was Biggest Blunder of His Presidency*, N. Y. TIMES (Mar. 4, 1992), http://www.nytimes.com/1992/03/04/us/1992-campaign-white-house-bush-says-raising-taxes-was-biggest-blunder-his.html?pagewanted=all [https://perma.cc/NQ5W-42ZJ].

3. President Trump has marked various programs, including funding for the arts and scientific research, education, and Medicaid, for decrease and increased funding for the military. *See* OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDESee discussion *infra* note 22 and accompanying text.

4. For example, § 10511 of the Revenue Act of 1987 authorized imposition of user fees f private letter rulings from the IRS. Omnibus Budget Reconciliation Act of 1987, Pub. L. No. 10 203, § 10511, 101 Stat. 1330-284, 1330-446 (1987). The standard user fee for a letter ruling in 199

forfeitures to supplement revenue from government tax allocations—a phenomenon observed in the numbers of forfeitures that are not accompanied by any prosecution.[5] At the state and local level, revenue-based policing with aggressive enforcement of misdemeanors has become commonplace.[6] Hotel and characteristics. Critical tax research has exposed how many racial,[10] gender,[11] sexual orientation,[12] economic,[13] and other biases are embedded in facially neutral tax laws and how those biases generate systemic tax distribution inequities that overburden less affluent taxpayers and underburden more affluent and politically influential taxpayers.[14] Further, lack of standing precludes discriminatory taxation of those who are “other” because of their race, gender, or other characteristics, this Article identifies elements of tax structure that adversely impact those “others” who are or appear foreign. Part I considers taxing those who are neither citizens of nor residents in the United States. Part II identifies how existing tax structures burden immigrants and, in the case of unauthorized[18] immigrants, and, to a lesser extent, temporary authorized residents, deny those same taxpayers participation in the full range of societal benefits. Part III reviews current tax provisions that capture revenue from those who wish to escape the reach of the worldwide income tax and concludes the Article.

I. T6.8(h1]Id)-NGes ofed1h-0 8.52 2ap08 5364eIn.3(e)0.D(m)16.6(i)1(E)]TJ 748e the income producing activity.[22] Likewise principles apply to a wealth tax when the wealth is unconnected with the United States. Collection difficulty would render the tax impractical even if it were lawful.

While direct taxation of foreign citizens and residents may not be practical, indirect tributes may be another matter. During his presidential campaign, President Trump introduced the possible exaction of indirect tributes.[23] Trump argued then, and continued to argue during the NATO meeting in Brussels, that the United States should not be paying as large a share of the costs of maintaining the NATO alliance as it currently pays.[24] Trump insisted that other countries in the alliance should bear a greater portion of the monetary cost, especially in view of the United States continuing to provide militpe3ra.8( )11.4(U)-5(x w)6.11.5(i)5.2(n nt)5.3(r)3.5(i)5.2(e)0.9(s)

United States.[28] On the other hand, the additional revenue from the twenty percent tariff on foreign manufactured goods could be dedicated to the construction of the proposed border wall, another presidential initiative.[29] The tariff would give a market advantage to U.S. manufactured cars since the U.S. tariff would increase the price of foreign manufactured cars in the United States by up to twenty percent and non-U.S. manufacturers would pay, although not necessarily bear, the tax.[30]

Imposition of an import duty harkens to a pre-income tax era of federal taxation. Until the enactment of the Sixteenth Amendment,[31] the federal government was dependent largely on tariffs, although they began to wane as a revenue source beginning around 1900.[32] In recent years, tariffs have provided only about one percent of federal revenue.[33] As the importance of tariffs as a revenue source declined, imposition of tariffs became tied to protectionism by leveling the price of foreign and domestic materials and goods where the foreign producer could supply or produce materials and goods at a lower price than U.S. suppliers. The last decades have deemphasized tariffs further as international trade agreements removed barriers between domestic and foreign markets and eliminated tariffs except as penalty measures to prevent dumping of goods into the U.S. market at artificially low prices to eliminate U.S. competition.[34]

A tariff on Mexican-manufactured cars would introduce uncertainties into the market both in the United States and in Mexico. If Mexican-based automobile manufacturing remains in Mexico and pays the import duty to reach the U.S. market, the tariff successfully taxes foreign interests that may not vote in the United States. While the cost of the Mexican-manufactured cars will increase with the tariff, the Mexican manufacturer may be unable to pass the full tariff cost on to U.S. buyers. The manufacturer may bear part of the tax in the

28. *Id.*
29.

form of a reduced return on invested capital and the Mexican workers may bear part of the tax in the form of reduced wages and benefits so that the tariff collects taxes from foreign manufacturers and their foreign employees, all of whom are not U.S. citizens and voters. Even if some of the Mexican manufacturers are subsidiaries of U.S. corporations, the owners and managers of which may be U.S. voters, the tax nevertheless enjoys the rhetorical advantage of not being a tax on U.S. taxpayers.[35]

To the extent the manufacturer can pass the tariff cost on to U.S. buyers, the tariff becomes an indirect tax on U.S. consumers. According to representatives of the U.S. automobile industry, the consumers of the Mexican manufactured cars are likely to be predominantly low- to moderate-income individuals who cannot afford the higher priced and more profitable SUVs and trucks that experience high U.S. demand.[36] The tariff becomes a regressive tax taking a higher percentage of the income of low-income individuals than of high-income individuals. The tax also may price some consumers out of the automobile market and, concomitantly, out of the employment market as well if they need cars to commute to their place of employment. But if Mexicans are the "other," i.e., foreign interests without U.S. political power, low- and moderate-income American workers also may be the "other" in the political and social scheme of American politics.[37]

States to capture a withholding tax on interest payments from the United States and U.S. payers to non-U.S. persons. The United States could renegotiate its bilateral tax treaties to discriminate by country of citizenship and exempt interest payments to foreigners from some countries but not others. Similarly, renegotiation of tax treaties could increase wg ofleiJ 0 Tc 0.432 Tw T* [(pa)0.8(y)J 0 seayy
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system at retirement age because, in the case of unauthorized workers, they remain in the United States and are ineligible for benefits or, for both temporary workers and unauthorized workers, they no longer are in the United States and fail to claim benefits or otherwise fail to meet the participation criteria.[80] In addition, immigrants pay state and local sales taxes, excise taxes, and property taxes.

acceptable in many communities.[86]

In recent years, the United States has sought to discover foreign diverted and secreted income of U.S. persons by imposing penalties[94] on those who secrete their income offshore and sanctions on financial institutions and others that facilitate the secretion.[95] The IRS initiated an offshore voluntary disclosure program enabling taxpayers who secreted assets offshore to disclose their offshore investments and receipts, pay the tax due, and become subject to reduced civil penalties and free from criminal prosecution for tax evasion.[96] Through its 2009 initiative, the IRS collected more than $10 billion.[97] Not everyone applauds the success of the Foreign Account Tax Compliance Act ("FATCA"). Some constituency to repeal FATCA certainly exists.[98]

CONCLUSION

This Article discussed some of the ways in which foreign interests become intentional or incidental subjects for the production of revenue in the current anti-tax political climate. The Trump administration seems likely to seize upon additional opportunities to tax non-U.S. interests in order to raise revenue to fund Trump's campaign promises, including increased military spending, infrastructure projects, a border wall, and corporate and individual tax reductions while avoiding the political toxicity of increasing taxes on U.S. voters who wield political influence.