

Policy Insight

No Taxation Through Litigation

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With Preface by

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Preface

Taxation through litigation is a concept most will find foreign to their understanding of the American political process. We are taught in basic American government courses that taxation is a function of the legislative branch. This is so because taxation by the judicial or executive branches of government would be taxation without representation. It is a fundamental principle of the United States and every state constitution.

In this paper, Peter Ferrara calls for a halt to the rapid growth of taxation through litigation. Of course the proponents of the various state and federal lawsuits seeking recovery of government expenditures for health care and other social services do not describe what they are doing as taxation. They claim to be seeking recompense for costs which government has borne as a result of the harmful behavior of others.

Like almost every other state, Oregon was a party to the lawsuit against the tobacco industry for the recovery of Medicaid costs. As a result of the settlement negotiated with the industry, Oregon legislators and other officials now face the task of distributing the spoils. The good news for the state is that it has an increase in revenues without the political consequences of a tax increase. While we might comfort ourselves with the thought that the tobacco industry is paying, the truth of the matter, as Ferrara makes clear, is that smokers (all of whom are taxpayers) will really pay. If the tobacco companies have committed an actionable wrong, it is not to the state but to the smokers who have been misled by assurances of safety. There is no small irony in the fact that those very same smokers must pay the costs of the states' settlement with the industry.

To date there has been no judicial verdict finding the tobacco companies liable for Medicaid costs. The companies settled because of the immense cost of defending the multiple cases and their assessment of the risk of losing those cases. The settlement reflects a judgment by the industry that it is better off with the settlement, but it sets a bad precedent if understood as an acknowledgment of liability.

Are the people of Oregon or of the nation better off as a result of the tobacco settlement? Ferrara demonstrates that the answer is surely "no." The floodgates have been opened. Alcohol manufacturers are sure to be named as defendants soon, and the makers of guns have already come under attack. Last winter, Philadelphia Mayor Edward G. Rendell called for dozens of cities to file suit against gun manufacturers. Portland officials were among the many to consider taking legal action.

There is no end to the other industries whose products and services can be said to impose costs on government. But these are costs which governments have willingly chosen to assume. Reliance on the tort system to recover the costs of programs that the nation's legislatures have created in pursuit of the public interest, is a fundamental distortion of the tort system and a violation of the principle of the rule of law. It is also a judicial usurpation of the democratic process.

If tobacco companies, gun manufacturers and alcohol distributors have been negligent or dishonest in the manufacture or sale of their products, the tort system provides remedies for injured consumers. But the judicial system should not be used by the government to recoup the costs of social programs. Peter Ferrara ably demonstrates that we are heading down a dangerous path. The revenues anticipated by Oregon and other states will prove not worth the cost to our legal system and our democratic principles.

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Introduction

In his State of the Union Address in January, 1999, President Clinton announced that "the Justice Department is preparing a litigation plan to take the tobacco companies to court." Clinton had ordered the Justice Department to sue cigarette manufacturers to recover the alleged costs paid by Medicare to treat smoking-related illnesses.

This follows a previous joint suit by the states against these companies to recover the alleged smoking-related costs of Med-

icaid. That suit was settled with the cigarette manufacturers agreeing to pay almost \$250 billion to the states over the next 25 years.

That settlement effectively imposed a tax increase on smokers of \$250 billion over the 25 year period, or about 45 cents a pack, as the cigarette prices paid by smokers are the only source of funds to finance these settlement payments. If the federal Medicare suit is successfully pursued, it would result in another, even greater tax increase. President Clinton has said his suit would impose "hundreds of billions" in additional costs on cigarettes.

These suits are primary examples of a dangerous new trend. As the strong opposition of voters to higher taxes has generally stopped overt, legislated tax increases in Congress and state legislatures, some are turning to other, more hidden means of raising taxes. Perhaps the most dangerous of these is taxation through litigation.

Under this approach, federal, state or local governments will sue an industry for some general, foreseeable social harm that everyone knows about. Cars inevitably lead to accidents; guns are used in crimes; milk, eggs, cheese and hamburgers cause heart attacks; beer, wine and alcoholic beverages drunk to excess result in illness and accidents; etc. The government will claim that the producers of these products must pay for the costs of such results, even when the real cause is misuse of the product. Either through a settlement or a final judgment, the industry will be forced to pay the government some enormous sum over many years to compensate for such harmful results. This amount will then be recovered from consumers through higher prices, an effective tax increase through higher prices imposed on them by government.

No one is safe from this new taxation mechanism. Taxes have already begun to be imposed through this means on smokers. A number of cities have now sued gun manufacturers as well, demanding payment for the health costs of treating gun injuries and for the policing costs needed to deter such criminal conduct. The list of potential victims is endless, limited only by imagination. But in each case, it is consumers and working people that will pay for all of this

through an effective tax increase.

In this report, we will focus on President Clinton's Medicare suit as the clearest and most immediate example of this trend. We will discuss below each of the major reasons why this lawsuit is wrong and should be stopped. These overwhelming criticisms apply as well to similar suits that may be brought against other industries by the federal, state or local governments. The report will conclude with a discussion of solutions and taxpayer protections that could be enacted to stop this new threat.

Taxes are already too high

Smokers already pay high federal, state and even local excise taxes on cigarettes. The federal excise tax alone is 24 cents per pack. With the varying state and local taxes, the total excise tax levy averages over 50 cents per pack.

Studies show that these taxes are already greater than the total costs to government that can be attributed to smoking. The Food and Drug Administration in fact has estimated that "smoking creates net external costs of about \$0.33 per pack."¹ Indeed, the FDA has stated, "the most detailed research on the issue of whether smokers pay their own way is the 1991 study by Manning, et al., who concluded that there is no net externality, because the sum of all smoking-related externalities is probably less than the added payments imposed on smokers through *current* Federal and state excise taxes."

Similarly, researchers for the Congressional Research Service have stated:

The financial costs smokers impose on nonsmokers have been extensively examined in a 1991 study funded by the Rand Corp. Updating the study's mid-range estimate to 1995 levels yields a net external cost of smoking of 33 cents per pack. Since current federal, state and local taxes are 50 cents per pack or more on average, the Rand sponsored study suggests that smokers are already paying more than their way.²

Moreover, smokers also already pay heavy payroll taxes over their entire working ca-

reers and substantial monthly premiums to finance Medicare. These payments cover most of Medicare's costs and are not counted in the above analysis.

Indeed, the government gains from smoking overall, as early deaths from smoking save the government huge amounts in costs for Social Security and Medicare. In a 1994 study, now Harvard economist W. Kip Viscusi concluded that "the cost savings that results because of the premature deaths of smokers through their lower Social Security and pension costs will more than compensate for the added costs imposed by smokers....On balance there is a net cost savings to society."³ In fact, a 1997 study published in *The New England Journal of Medicine* found that smoking actually reduces total medical spending, because

"Now, with classic hypocrisy, we're being told that it's still going to be perfectly acceptable to keep selling these 'dangerous' products as long as government can get a big enough piece of the new tax pie."

– Dan Popeo, President of the Washington Legal Foundation

people who die earlier consume less medical services over their lives than people who live longer.

For these reasons, the Congressional Research Service concluded that "all in all, smoking has apparently brought financial gain to both the federal and state governments." Consequently, there is no justification for imposing higher taxes to compensate for the smoking-related costs of Medicare.

In addition, a tax increase through a government-imposed increase in cigarette prices would be highly regressive. It would fall most harshly on lower income people for 2 reasons - they are more likely to smoke, and cigarette costs consume a larger share of their modest incomes. Over half of current cigarette tax revenue comes from people making less than \$30,000 per year, and about a third comes from those making less than \$20,000 per year. Almost all of it, 97%, comes from people making less than \$75,000. As Amy Ridenour, President of the

National Center for Public Policy Research says, "If President Clinton really believes the federal government needs more revenue, he should not look to the poor and middle class to finance it."

All taxes at all levels of government already constitute 75% of the cost of cigarettes. Out of what the consumer pays for a pack, 75% already goes to federal, state and local governments for various taxes rather than to the cigarette producers. This includes federal income taxes, state income taxes, federal payroll taxes, unemployment insurance taxes, workmen's compensation taxes, local property taxes, and any local income taxes. For the delivery truck, the cigarette producer must pay gas taxes, tire excise taxes, truck highway use taxes, and heavy truck excise taxes. On the phone in the ciga-

rette factory, the producer must pay telephone excise taxes.

With huge Medicare- and Medicaid-related effective tax increases added on, what the consumer pays for cigarettes will be almost all taxes. The price for a pack of cigarettes could well soar to \$4 or \$5, with the actual cost of producing it much less than \$1.

This will only stimulate a massive black market in cigarettes from alternative and mostly foreign producers. Organized crime will greatly increase as a result, with a vast new market and vast new reserves. As the Hispanic Business Roundtable states:

A higher federal tax would further the significant price differences between Mexico and the United States - for example - virtually guaranteeing the creation of a massive black market controlled by organized crime, which would likely be more lax in sales to youth. Without a doubt, a new black market trafficking tobacco from

Mexico would target the Hispanic community in the southwestern states, and our youth in particular.⁴

This huge effective tax increase would also hurt many small farmers, who are already reeling from the lower demand due to the state-imposed Medicaid-related tax increases. The expected drop in cigarette demand from these increases has already reduced tobacco crop demand by 30-35%. Unlike most other crops, tobacco can be grown profitably on small acreage, providing a viable niche for many small farmers. Indeed, many small farmers use tobacco as a profitable economic foundation for an entire operation diversified into other crops and livestock. Without the tobacco income, many of these small farm operations would fail as well. As several members of Congress recently wrote to President Clinton, "Often,

state, and local taxes than they do for food, clothing, and shelter combined. Taxes as a percent of the economy are at their highest level relative to the economy since World War II, which was the highest level in U.S. history. Taxes need to be cut, sharply, not increased further.

Finally, nothing could be more ironic or hypocritical than for federal and state governments to be reaping hundreds of billions from the sale of a product, on the grounds that the product is so dangerous and harmful to health. As Dan Popeo, President of the Washington Legal Foundation, has written:

Now, with classic hypocrisy, we're being told that it's still going to be perfectly acceptable to keep selling these 'dangerous' products as long as government can get a big enough

department study of the issues, saying "What we have determined was that it was the states' cause of action and that we needed to work with the states, that the federal government does not have an independent cause of action."¹⁰ Justice Department spokesman Joe Kirovsky explained the very same day, "Right now, it would seem we don't have the authority to sue."¹¹

The Justice Department was quite right. It has no case. But President Clinton has ordered the department to sue anyway.

No statute provides authority for a federal suit to recover the costs Medicare pays to treat smoking-related illnesses. The Medicare statute says nothing about suing for recovery of Medicare costs. The Medical Care Recovery Act provides only that the government can recover benefits it has provided to an injured person if that person also receives benefits from a private insurer or recovers costs for the injury from a wrongdoer. Its purpose is to save the government from effectively paying a double recovery to the injured person. It does not provide a basis for suing anyone who has allegedly caused the government a cost under Medicare through some harm to a Medicare beneficiary.

Under the common law, the government could try to recover Medicare costs as a private insurer might. In that case, it would stand in the shoes of particular Medicare beneficiaries who were harmed through smoking and sue in their stead under the doctrine of "subrogation." But the government would then have the same rights and be subject to the same defenses as these individual beneficiaries themselves would if they sued.

But as has been shown over and over in suits by individuals against cigarette companies, these individuals cannot prevail because they assumed the risk of smoking. They clearly knew the dangers of smoking – each pack of cigarettes itself warns of the danger, and has done so for over 30 years. Yet, smokers each decided to take the risk anyway.

The government under the current administration clearly recognized this principle when it was threatened with suits for having provided free cigarettes to soldiers before 1974. President Clinton's former

"What's next? It's hard to say...Unless the courts reject our approach, we will continue to utilize it to tackle industry bullies."

—John Coales, Plaintiffs' attorney in the states' tobacco lawsuit.

these small tobacco allotments provide the difference between being able to keep or having to sell the family farm."⁵

Every acre of tobacco grown in fact already raises over 10 times as much in taxes for the government as income for the tobacco farmer. The federal, state and local excise taxes alone amount to \$19.54 per pound of tobacco. Yet burley tobacco farmers have recently averaged \$1.88 per pound in price for their product, and other types of tobacco have been in the same range. If taxes on tobacco are massively increased even further, it will just drive tobacco and cigarette production overseas, losing American jobs and economic growth, with no end effect on smoking. As a result, as the Virginia Tobacco Growers Association recently wrote, the federal Medicare suit "will ultimately and inevitably lead to nothing short of the total devastation of both the nation's tobacco farmers and the communities in which they live."⁶

Taxes overall are already far too high. The average family today pays more in federal,

piece of the new tax pie. Who's kidding whom? They don't really want 'Big Tobacco' or its customers to go away at all. The new smoking control scheme is just public policy pageantry.⁷

Similarly, *The Wall Street Journal* has denounced "the spectacle of politicians denouncing cigarettes as a drug while trying to fill their pockets with the drugs' profits."⁸ Or, as Pat Buchanan put it, "Pardon the cynicism, but these shakedowns by government in the name of compassion are getting to be both transparent and addictive."⁹

No legal basis for a suit

During testimony by Attorney General Janet Reno before the Senate Judiciary Committee, on April 30, 1997, Senators Kennedy and Durbin both asked Reno why the federal government doesn't file its own suit to recover the smoking-related costs of Medicaid, Medicare, and other programs. Reno responded with the results of a Justice De-

Veteran's Affairs Secretary Jesse Brown disclaimed any liability saying it would be "borderline absurdity" for the government to be held liable for "veterans' personal choice to engage in conduct damaging to their health." He also said, "If you choose to smoke you are responsible for the consequences of your act."¹²

Any attempt by the current administration to recover in a suit beyond these grounds would pervert the tort law beyond all recognition. The government may try to argue that smoking caused some general estimated degree of illness among Medicare beneficiaries and that has produced some general estimated costs. The government would then have to argue on some new made-up theory that it should be entitled to recover these costs resulting from the legal use of a legal product. It would then have to hold companies liable for these costs based on the market share of each, without proof that each company's product caused any particular share of the harm.

This social theorizing is not a lawsuit. There would be no proof here of specific harm to a specific claimant caused by the wrongful act of a specific party. Producing and selling cigarettes for smoking with the health risks broadly publicized and universally known is not a wrongful act, it is a specifically permitted activity under government policy.

If the law were set loose from finding liability only for specific harm to a specific claimant proximately caused by a specific wrongdoer, then there would be no limits on the liabilities courts could impose. They could effectively loot any and all property based on some popular opinion of the day. No property and no industry would be safe. This is not the rule of law, and a modern economy cannot function under such a regime.

These types of arguments belong before a legislature considering whether to impose a regulation or a tax to correct some social problem, subject to democratic control. They do not belong in a court asking an unelected lifetime tenure judge to rearrange society to suit some philosophical perspective.

Moreover, how could the government expect to win any such suit when it has so

directly subsidized and encouraged smoking for so long? The government has subsidized tobacco farming, reducing the price of tobacco and cigarettes as a result, which translates into more smoking. By the very act of covering smoking illnesses under Medicare, the government has again encouraged smoking, reducing smoking costs by volunteering to pay the bills of any resulting illness. Up until 1974, the government even distributed free cigarettes to soldiers.

Indeed, the government has directly benefited from all this smoking, effectively taking the lion's share of the profits through its high excise tax on cigarettes. How can the government expect to recover funds for a practice in which it has effectively participated and shared the gains?

In addition, the government assumed the

Department has discussed passing legislation to grant the federal government specific authority to recover from the cigarette companies and strip those companies of any legal defenses.

Such legislation, however, would clearly be unconstitutional on several grounds. First, such retroactive legislation would violate the constitutional requirement for due process of law. In *Honda Motor Co. v. Oberg*, 512 US 415, 430 (1994), the Supreme Court said, "abrogation of well-established common law protections against arbitrary deprivations of property raises a presumption that its procedures violate the Due Process Clause." Similarly, in *Landgraf v. USI Film Products, Inc.*, 511 US 244, 265 (1994), the Supreme Court said, "Elementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their

"If the current [tobacco] lawsuit is successful, it will establish a powerful precedent.... The list of potential victims is endless, limited only by imagination."

risk of covering smokers under Medicare. The government cannot claim it did not know of the health and cost risks of smoking. It has been warning of the health risks since before Medicare was adopted in 1965, and began requiring health warning labels on cigarette packs the very next year. The government knew when it adopted Medicare that many would get sick due to smoking and the program would be paying their health care costs. Yet, the government went ahead and voluntarily assumed this risk anyway.

Finally, another complete bar to any recovery is that, as discussed above, smokers have already more than paid their own way through the excise tax on cigarettes, let alone their Medicare taxes and premiums. Through the Medicare lawsuit, the government would actually be seeking a double recovery, if not more.

Unconstitutional claims

The government, in fact, knows that its legal case is so bad that the Justice

conduct accordingly." Clearly, passing a law after the fact that declares liability of the cigarette companies and deprives them of long established legal defenses cannot be consistent with the procedural fairness mandated by the due process clause.

Indeed, the state of Florida passed a statute imposing liability under a state suit on cigarette manufacturers for smoking-related Medicaid costs without the suit having to name specific individuals harmed and show specific Medicaid costs they incurred as a result. In *Agency for Health Care Administration v. Associated Industries of Florida*, 678 So. 2d 1239 (Fla. 1996), the Florida Supreme Court ruled that these provisions of the statute violated due process and struck them down as unconstitutional.

Such retroactive legislation would also violate the Takings Clause, as well as quite possibly the Bill of Attainder and Ex Post Facto Clauses. In *Eastern Enterprises v. Apfel*, 118 S. Ct. 2131, the Supreme Court held the Coal Industry Retiree Health Benefits Act an unconstitutional taking because

it effectively imposed liability on the coal industry retroactively to pay for illnesses of retired coal miners. The Court said that such retroactive laws undermine “confidence in the Constitutional system.” 118 S. Ct. at 2159.

In addition, if the legislation applied only to the cigarette industry, it would clearly violate the Equal Protection Clause. See, e.g., *Yick Wo v. Hopkins*, 118 US 356. If the legislation were drafted broadly to apply to everyone, then it would be a huge menace threatening to loot every private industry with no defense allowed.

Even apart from such retroactive legislation, a Medicare recovery suit seeking to hold the cigarette companies liable based only on broad statistical evidence regarding social harm and apportioning liability based only on market share would also be unconstitutional. Article III of the Constitution limits the judicial branch to trying specific cases and controversies. That means precisely cases involving specific harm to specific claimants proximately and wrongfully caused by a specific product.

In *In re Fireboard Corp.*, 893 F.2d 706 (5th Cir. 1990) the court rejected a broad statistical claim against asbestos manufacturers similar to the Medicare claim on precisely these grounds, saying: “the procedures here called for comprise something other than a trial within our authority. It is called a trial, but it is not.” 897 F.2d at 712.

In *Cimino v. Raymark Industries, Inc.*, 151 F.3d 297 (5th Cir. 1998), the court rejected another broad based asbestos claim on the grounds that holding the defendants liable without proof of specific harm to a specific claimant proximately caused by a specific product would violate the defendant’s 7th Amendment right to a trial by jury. The same point would apply to the Medicare suit against the cigarette manufacturers.

Such broad based claims also deny the defendant due process of law, because they deny common law defenses, and rights to challenge a specific harm to a specific claimant or whether the harm was proximately caused by the defendant. See, e.g., *National Union Fire Insurance Co. v. City Savings*, 28 F.3d 376, 394 (3d Cir. 1994). Accepting broad based claims as legally valid would,

indeed, have the same effect as legislation specifying liability and stripping all defenses and, consequently, would be unconstitutional on the same grounds.

Subverting democracy

Only Congress has the power to raise federal taxes. Last year, Congress rejected a massive tax hike on cigarettes proposed by the current administration. The Medicare lawsuit is simply an attempt to go around Congress and impose this tax increase through the courts. As Amy Ridenour says, “By suing tobacco companies, President

Congress. For the strategy appears to be to use the threat of highly burdensome and costly litigation to win a settlement with the cigarette companies, gaining concessions on taxes and regulation it could not achieve through Congress. *The New York Times* reported on January 21, 1999 that “lawyers involved in the [Medicare lawsuit] effort said the aim would be to win concessions not included in the recent [Medicaid] settlements....These would include measures like federal regulation of cigarettes and nicotine...under the Food and Drug Administration,” as well as tax increases.

“In the end, it is consumers and working people who would pay for all of this, suffering a massive new tax burden because of taxation through litigation.”

Clinton is clearly trying to raise revenue while bypassing the legislative branch, which is reluctant to raise taxes to the higher level Clinton prefers.”

If this lawsuit maneuver is allowed to succeed, it would subvert our democracy and constitutional framework of government. It would take the power of taxation away from Congress and, as a result, the democratic control of the people, giving it instead to courts with unelected judges, who could impose taxes at the unilateral request of the President. Paul Weyrich says it best:

[T]he entry of the federal government into the lucrative lawsuit business opens the door to taxation without representation. Any government action that takes money from an industry is a form of tax. But taxation by lawsuit bypasses the whole legislative process. In effect, it enables the executive branch to impose a tax by fiat....Taxation without representation was one of the fundamental causes of our rebellion against Great Britain. Americans should understand that the precedent established by this lawsuit will be the equivalent of King George’s hated Stamp Act.¹³

Indeed, this lawsuit strategy could even leave courts out of the equation as well as

When issues such as higher taxes to counter social harms or FDA jurisdiction and regulation are decided through settlements, the president is allowed to make law unilaterally through intimidation, not democratic decision making. Congress and the public are consequently denied the opportunity to consider all the complexities and interests involved and come to an acceptable compromise through political give and take in the democratic process. A more complete perversion of our democratic system is hard to imagine.

Who’s next?

If the Medicare lawsuit is successful, it will establish a powerful precedent for taxation through litigation. This precedent would then be used to impose wide-ranging taxes on other industries.

Already, inspired by the cigarette industry precedent, the cities of Chicago and New Orleans have sued gun manufacturers to recover the public health and safety costs incurred to treat and prevent injuries caused by guns in their cities. If successful, such suits would end up imposing effective new taxes on guns by raising their price to finance the costs of any settlement or judgment. In effect, harsh restrictions on private gun ownership by law abiding citizens could result as well, all but ending their

right to self-defense.

But that is just the beginning. Suits against car manufacturers could add effective new taxes because of the inevitability and foreseeability of the crashes, injuries, and deaths that result from use of their product. Some cars, such as sports utility vehicles, or high performance cars, could essentially be banned as a result.

Other suits could impose new taxes as well on beer, wine and other alcoholic beverages because excessive use by some, which will inevitably happen, produces harmful health consequences and accidents. Producers of high fat foods and restaurants that serve such foods could expect suits effectively taxing their products and services because of the health consequences of high fat diets. Dairy farmers beware.

The list of potential victims is endless, limited only by imagination. As Paul Weyrich writes:

If the federal government can sue the tobacco industry, what industry or line of work is safe from a similar shakedown or shutdown? Firearms manufacturers and dealers could well be next to face a massive Federal lawsuit. The same logic that lies behind the threat against the tobacco industry could be applied to the beef industry; the liquor, wine, and beer industries; fast food corporations; the automobile industry, and many others. The list of industries that can be accused of endangering someone's health is probably longer than the list of those that cannot. Will we see a federal lawsuit shutting down Dunkin Donuts?¹⁴

In the end, it is consumers and working people who would pay for all of this, suffering a massive new tax burden because of taxation through litigation. They may also lose access to many useful and valued products.

The attitude of the perpetrators of these lawsuits is revealed by states' attorney John Coales, who recently said:

What's next? It's hard to say. Right now our plates are full tackling these

politically powerful and unregulated industries. But we are interested in taking a close look at the exorbitant prices of prescription drugs, for example. Unless the courts reject our approach, we will continue to utilize it to tackle industry bullies.¹⁵

Jonathon Rauch more accurately captured the approach of Mr. Coales and his colleagues in an article in the *National Journal*, writing, "They were like a bunch of bandits lurking on the highways, but using lawsuits instead of revolvers."¹⁶

This is why the National Restaurant Association correctly writes, "The threat of this litigation casts a very disturbing shadow over the entire business community."¹⁷ Several members of Congress have also written regarding the Medicare lawsuit:

The simple assertion of such a claim, no matter the motivation, would create a troubling precedent that could be used to threaten the confiscation of massive funds from any American industry. Such a confiscation would allow the Executive branch to levee "taxes" on an industry without consulting with Congress.¹⁸

The U.S. Chamber of Commerce simply and accurately calls the Medicare suit "a gross misuse of presidential authority."¹⁹

Solutions

This new taxation through litigation must be stopped. Instead of passing legislation authorizing the federal suit, as President Clinton may request, Congress should pass legislation to stop it and all future taxation through litigation claims. Suits seeking recovery for general social harm proved by general statistics should be prohibited in all federal courts. Federal cases must be limited to specific harm proven to be suffered by specific individuals. Indeed, Congress should adopt by statute the common law rule of liability only for proximate causation of the harm by the defendant, as well as the common law defenses, such as assumption of the risk and contributory negligence.

The states should each adopt these provisions for their courts as well. In addition to ending taxation through litigation, this

would effectively solve the tort crisis as well.

Moreover, Congress should amend the equity powers of all federal courts specifically to remove any power of a federal court to order a tax increase. One of the bedrock principles of this nation is no taxation without representation. Taxes can only be imposed by the democratically elected representatives of the people. Rep. John Manzuolo (R-NJ) has already developed such a proposal. The states should each adopt this provision for their courts as well.

Conclusion

As Paul Weyrich writes, "The Clinton Administration's new threat of a Federal government lawsuit against the tobacco industry is much more than an attack on tobacco. In fact, it is a direct attack on the liberties of all Americans."²⁰ Robert Levy similarly writes:

The Clinton Administration is embarked on yet one more raid on private wealth - a bald attempt to fatten the federal treasure chest without regard for individual liberty, personal responsibility, or the rule of law.²¹

Grover Norquist adds, "This fight is not about tobacco or teenagers. It is yet again about spending more money, and consolidating more power and authority in Washington. It is also a model for future action."

The federal Medicare suit, and the broader taxation through litigation it portends, must be stopped. Such suits would impose effective tax increases on working people through the courts rather than through the democratic system. Democratic control by the people in this nation would consequently be subverted, and we would be back to taxation without representation. There is no sound legal basis for such suits, and their claims are in fact unconstitutional. If not stopped now, taxation through litigation will grow and grow, eating up industry after industry, and ultimately destroying the prosperity of the American people.

Congress and the state legislatures can and should take concrete steps to stop this new taxation through litigation crusade.

About the Author

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Endnotes

¹ 61 Fed. Reg. 44,572 (1996).

² Jane G. Gravelle and Dennis Zimmerman, *The Washington Post*, June 5, 1994. See also, Jane G. Gravelle and Dennis Zimmerman, CRS Report for Congress, *Cigarette Taxes to Fund Health Care Reform: An Economic Analysis* (1994).

³ As quoted in Jacob Sullum, “Following Suit,” *Reason*, April, 1999

⁴ Letter from Roberto Garcia de Posada, Executive Director, Hispanic Business Roundtable, to Senator Pete Domenici, March 19, 1999.

⁵ Letter from Reps. Rick Boucher, William L. Jenkins, and Van Hillary to President William J. Clinton, Feb. 3, 1999.

⁶ Letter from Don L. Anderson, President, Virginia Tobacco Growers Association, to President William J. Clinton, Jan 28, 1999.

⁷ Dan Popeo, *The Washington Post*, May 8, 1998.

⁸ *The Wall Street Journal*, editorial, April 23, 1998.

⁹ Patrick Buchanan, *The Washington Times*, June 25, 1997.

¹⁰ Attorney General Janet Reno, Senate Judiciary Committee Hearing, April 10, 1997.

¹¹ Joe Kirovsky, Justice Department Spokesman, April 30, 1997.

¹² As quoted in Robert Levy, “Clinton’s Illegal Assault on the Tobacco Industry,” *The Wall Street Journal*, February 8, 1999.

¹³ Paul M. Weyrich, National Chairman, Coalitions for America, “New Assault on Tobacco a Smokescreen for Attack Against Freedom,” January 26, 1999.

¹⁴ Weyrich, *supra*.

¹⁵ *The Washington Post*, Jan. 31, 1999.

¹⁶ Jonathon Rauch, “Read This or I’ll Sue You,” *National Journal*, February 6, 1999.

¹⁷ Letter from Elaine Graham and Lee Culpepper to Senate Majority Leader Trent Lott, January 28, 1999.

¹⁸ Letter from Rep. Jay Dickey, et al. to Speaker Dennis Hastert, March 24, 1999.

¹⁹ Letter from R. Bruce Josten to Senate Majority Leader Trent Lott, 1999.

²⁰ Weyrich, *supra*.

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