

(This was posted on the forum for U.S. Constitutional History.)

Was the Civil War Income Tax an Excise?

**stein51**

This question was proffered to the panel (Tom, Brion and Kevin) during the live broadcast on April 15, which I feel was appropriate for the occasion and critical to understanding the American income tax. All of the panel punted claiming ignorance of American taxation history and alluded to holding the pragmatic position of going along to get along until the 16th Amendment is repealed. In other words: “why bother to study the history of the tax when it won’t make a hill of beans in the long run.” But of course like all subject matter, especially law, the historical context can make or break a correct understanding of it. The income tax is no exception. To gain this contextual understanding current beliefs, education and experiences regarding the tax must somehow be put aside and a concerted effort be put forth to honestly attempt to think how Americans did during this time.

Was there a general knowledge among Americans that an “income tax” in the nature of an excise was a privilege tax and how were they so informed? One of the most influential resources upon early Americans was Blackstone’s Commentaries. In the chapter: Of the King’s Revenue Blackstone discusses how, since at least the Glorious Revolution, the indirect system of taxation was adopted in Britain as more reflective of a free people. It was this system that was adopted by the Founder’s as the main fiscal engine of the new federal government, when Congress was given the power to levy duties, imposts and excises. Blackstone lists various excises or duties as representative of the system in 1760’s Britain. The ninth and last duty was the office duty upon the privilege of receiving gain, profit or income whose

ultimate source was from government. It was as Blackstone put it: “highly popular taxation.” This particular duty was unmistakably a tax upon the privileged political class and reflective of the classical liberal thinking that government service was for altruist ends not personal gain. In fact the whole question of graduation was born out of this thinking. The more one gains from a political privilege the more he is obligated (duty) to return.

The historical record is replete with evidence that the Civil War income tax was indeed an excise and enforced as such. 1) The 1861 income “tax”, which was not enforced, was repealed by the 1862 income “duty”. The name change was not mere coincidence but a clear indication that it was not to be recognized as a direct tax, which the name of the 1861 tax could erroneously express. 2) The tax form to be used to file a return of income expressly declared that the duty was authorized under the excise laws of the United States. 3) The SCOTUS declared matter-of-factly in 1880 in Springer that the duty was an excise. Springer was a federally licensed attorney who failed to properly declare his income. 4) The official reports from the CIR during this period show that less than 1% of the population filed returns. Strongly supporting the conclusion that it was a limited and specific privilege tax effecting few.

Thus, to extend the claim that the Lincoln administration utilized the income duty as another unconstitutional encroachment to further advance centralized national power is probably going too far. It was obviously just the use of Congress’s longstanding constitutional excise power to tax the exercise of government privilege and measure it by the income that the privilege produces. In fact it was so successful that it was responsible for a quarter of the revenue collected via taxation. Which I might add was miniscule compared to borrowing and paper-money printing.

So what does it all matter since we are saddled with the 16th Amendment?

Could it be that because such basic taxation knowledge is lacking conclusions

drawn concerning the meaning and purpose of the amendment are nothing but propaganda and myths perpetrated by the political class and camp followers to achieve what the income tax as an excise could never achieve and was originally levied to help prevent: empire?

Note: Charles Adams entertaining romp through taxation history, *For Good and Evil*, gives an illuminating discussion of the indirect system of taxation. Check out chapters 27 and 28.

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Populism and the Income Tax

### **stein51**

In the Populism lecture it was simply stated that the populists wanted an income tax as part of its platform. It was left at that, leaving to presumption any conclusions as to the nature of the tax that the populists wanted to implement. To be fair to the populists and to the subject matter an expansion is needed.

There are two types of income taxes. One can be direct, the other indirect. The important distinction between the two is that a direct tax is general and upon rights, upon the right to own and possess property (such as on your and everybody else's annual revenue), and an indirect tax is upon voluntarily-entered-into privileges granted by government.

The British indirect or benefits system of taxation was adopted by the Founders to provide the day to day revenue to run the government. One of these privilege taxes or excises, as noted in the very influential Blackstone's Commentaries, was the office duty. This was a tax upon government privilege measured by the income that the privilege produced. The British later incorporated the office duty with a general direct tax upon the incomes of the

people calling the whole package an income tax in 1803.

The WBTS prompted the first such official usage of this excise in 1862, and it was styled in part as an Income Duty. This tax, in its whole, collected a quarter of the revenue generated by all the internal excise taxes in force, was very popular with the people (99+% of the population was unaffected by it), and was easy to administer (the government has knowledge of privileges it grants). The tax was let expire in 1873 but it was still fresh in the minds of the populist's of the 1880's and 90's. (And as the passage of 1894 income tax would show: so it was in the minds of the Democrats, also.)

The farmers and others who made up the populists believed that in all fairness to the benefits system of taxation the "political entrepreneurs" who had been granted privileges that made them fabulously wealthy and thereby politically influential, should be taxed on those gains in the hope that other taxes which directly affected them (tariffs on farm implements, for instance) could thereby be lowered. The fact that such a tax, especially when graduated, would have a chilling effect on the rampant corruption systemic with "political entrepreneurs" probably didn't slip their attention either.

Looks like a slam dunk for the income tax as an excise, but let's now take the contrary position that the populist's wanted an income tax in the nature of a direct tax. Of course this period was before the 16th Amendment and the cognitive fog that it generated, so it was common knowledge that such a general on-your-right-to-exist tax had to be apportioned among the states. We know from the ratification conventions that the apportionment of such taxes was to prevent the federal government from being able to directly lay a hand on the people's revenue, instead having the states collect the levy according to its particular method of collecting it. Typically the states, especially the western agrarian states, used an ad valorem property tax to collect their particular portion, placing the burden on poor struggling farmers. This was evidenced by the abandonment of the 1861 direct tax on these very grounds.

So a direct tax was, with certainty, not what they wanted.

Further, as the history of American direct taxes show, the styling of such taxes was confined to the term: direct tax, because apportionment would in many cases prevent the collection of the tax on the desired object, such as income. With this in mind, any populists who may have desired a direct tax would have called it just that, not an income tax.

For a more thorough and detailed discussion of the income tax as an excise see the work of Peter Hendrickson, a fellow libertarian, at [losthorizons.com](http://losthorizons.com). His writing is voluminous so I recommend taking his pop quiz and linking to essays discussing the answers: <http://losthorizons.com/Documents/TheQuizPage.htm>