

## The Estate Tax Stalemate Debate Continues

To the Editor:

In a short piece in the November 15, 2004, issue of *Tax Notes* (p. 997), "A Look Into the Future of Estate Tax Reform," I summarized the conclusion of work I have been doing with the political economist Linda Cohen ("Shakedown at Gucci Gulch: A Tale of Death, Money and Taxes"). Prof. Cohen and I find that congressional action and inaction on the estate tax over the last several years, highlighted by the Economic Growth and Tax Relief Reconciliation Act of 2003's strange twist of the one-year repeal, in 2010, is best explained by a "rent extraction" model — legislators want to string along an issue that is good for generating campaign contributions on all sides.

In a thoughtful reply ("Another Take on the Estate Tax Situation in Congress," *Tax Notes*, Dec. 20, 2004, p. 1705), Prof. Meade Emory restates our main findings and argues that we overlook a "far more logical" explanation, namely that "the stalemate reveals a deep philosophical difference in Congress on the role that a wealth transfer tax should play in this country's tax structure." Prof. Emory points to the two camps, as identified also in my work with Prof. Cohen, of "reformers," those favoring weakening (as by raising the "unified credit" exemption level to \$4 or \$5 million per person, \$8 or \$10 per family), and "abolitionists," those favoring outright repeal, and suggests that the aforementioned "philosophical difference" explains their inability to compromise.

I welcome Prof. Emory's insightful analysis, and I reiterate that the "truth" of the matter — if there is a single one — is hard to pin down. Congress would hardly admit to rent extraction, after all, and it is hard to impute single motives to complex, multimember institutions. I fully agree with Prof. Emory that the "estate tax repeal movement did not arise from any kind of collective congressional action." In our longer piece, Prof. Cohen and I write:

Anticipating here at the start the two most likely objections, we emphasize, first, that nothing in the ex ante rent extraction phenomenon depends on Herculean acts of foresight, prescience, or, for that matter, ex ante coordination. Congress may not have known what a good thing it had, in estate tax repeal/non-repeal, until history dumped the issue in its collective lap. But once they stumbled onto the example, like the proverbial drunken sailor, the conception predicts what they would — and did — do. In general, the ex ante rent extraction technique predicts that Congress will generally avoid "ballot box" issues, preferring instead to devote its time to issues of high stakes to small groups. When it finds

such issues, it will often string matters along. It will avoid sensible, good-faith compromises, and often produce laws unintelligible except as signals of its power to help, harm — or help to form — special interest groups. Second, we do not suggest that the ex ante rent extraction effect explains all or even any specifically quantifiable part of politics today. American politics are complex. Sometimes lawmakers do indeed respond reactively to special interest pressure; sometimes they respond to popular sentiment; sometimes they even act on principle. We mean merely to suggest, and illustrate with one extended and several short examples, that in at least some important cases, Congress is acting to create and perpetuate special interests in order to extract money from them.

Notwithstanding Prof. Emory's keen insights, I stand by our original thesis and respond to his countersuggestion with a few questions:

1. Why haven't any of the "abolitionists" joined the "reformers," to effect a sensible compromise? I can certainly understand some of them holding out for outright repeal. But all of them?
2. Emory argues that the reason that the "abolitionists" cling to their all-or-nothing strategy is that they couldn't get outright repeal after a compromise; they "would be left without even a patina of legitimacy for their claim for estate tax repeal and would be nakedly exposed in their quest for a greedy tax cut for the very very richest among us." But, of course, the abolitionists are so exposed when they vote against the reforms. So see question 1, again.
3. What "deep philosophical difference" exists between those who would weaken, and those who would repeal, the estate tax? Prof. Emory concedes that reform along the lines supported by virtually every senator who is not an abolitionist (Russell Feingold being the lone apparent exception) would leave the tax applying to less than 1/4 of 1 percent of us. And we know from years of practice that that group can avoid at least much of the tax. The claim of good-faith differences would be more plausible if the reformers were proposing to strengthen the tax. They are not.
4. Finally, what "logic" or "philosophical difference" explains the repeated votes, detailed in our article (and also in Karen C. Burke and Grayson M.P. McCouch, "Estate Tax Repeal and the Budget Process," *Tax Notes*, Sept. 6, 2004, p. 1049 at 1055 n.6), that keep coming up short — just short — of actually doing anything real or permanent? What principle is there in creating huge uncertainty to hang over the wealthy elderly, such that estate

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planners must recommend having their wealthy clients avoid their children in 2010? Surely even a deeply divided Congress can do better than that.

I believe these are hard questions for Congress to answer. I thank Prof. Emory and other readers for helping us to sharpen them, for I further believe that they need answering.

Sincerely,

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