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Revenge of the 80th Congress

By Sheldon D. Pollack

Sheldon D. Pollack is a professor of law and political science at the University of Delaware. He is the author of *The Failure of U.S. Tax Policy: Revenue and Politics* (Penn State Press, 1996); *Refinancing America: The Republican Antitax Agenda* (State University of New York Press, 2003); and *War, Revenue, and State Building: Financing the Development of the American State* (Cornell University Press, 2009).

In this report, Prof. Pollack puts the debate over the expiring Bush tax cuts in a broader historical context. The current battle over marginal income tax rates is the continuation of a long war that started after World War II, when the maximum income tax rate reached a historic 94 percent. With the rise of the Cold War and continued expansion of the American administrative state, tax rates never returned to prewar levels. According to the author, the ongoing struggle over marginal rates reflects the absence of political agreement on both a peacetime rate structure and level of government spending acceptable to majorities in the two major political parties. No compromise is in sight, so expect the war to continue regardless of the outcome of the midterm elections in November.

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As congressional battle lines are drawn over what to do with the expiring 2001 and 2003 Bush tax cuts, you can't help but experience a feeling of déjà vu all over again. This is just one more skirmish in a long war that has played out over the last seven decades and has yet to reach resolution. The Republican-controlled 80th Congress fired the opening salvo in 1947, demanding rate reductions in the wake of historic tax hikes enacted during the fiscal crisis occasioned by World War II. The conflict brewing in Washington today is but a continuation of that prolonged political struggle — and it is all getting a bit old. Republicans constantly accuse Democrats of excessive spending and increasing taxes on the wealthy, while Democrats condemn Republicans for enacting tax cuts that benefit the wealthy. Each party portrays itself as correcting the most recent injustice perpetrated by the other; each denounces the other for waging ''class warfare.'' Democrats still have not gotten over the election of George W. Bush — let alone his tax cuts, which, admittedly, lowered taxes mostly for the wealthy. Of course, the Bushies saw themselves as rolling back the partisan tax increases enacted under President Clinton that directly targeted their upper-income constituents. And bear in mind, Clinton was just reversing the unjust tax cuts of the 1980s enacted by President Reagan. Round and round the argument goes, where the top marginal rate stops, nobody knows.

The struggle today over marginal tax rates is complicated by the dismal economic condition of the government and the country at large. Soaring budget deficits have properly raised concerns over Republican proposals to extend the expiring Bush tax cuts (prominently included in the GOP's ''Pledge to America''), while the prolonged economic slump dictates against allowing those tax cuts to expire (as most Democrats would prefer). The main hitch with the Republican plan to extend the tax cuts is the exorbitant cost. Even a two-year extension of the Bush tax cuts would cost anywhere from $200 billion to $500 billion, while the Congressional Budget Office estimates that legislation to make the tax cuts permanent would cost $2.7 trillion over the next 10 years.[1] Now that's a lot of shekels — even in Washington, where $787 billion in stimulus spending disappeared into thin air faster than Bernie Madoff's $50 billion investment fund. At the same time, the Obama administration's proposal to limit the extension of the Bush tax cuts to those who make less than $200,000 a year ($250,000 for married couples) would put its own

[1]CBO, ''The Budget and Economic Outlook: An Update'' (Aug. 2010), at 26, *Doc 2010-18442*, *2010 TNT 161-20*. The revenue reduction attributable to the extension of the tax cuts would be partially offset by increased revenue collected under the alternative minimum tax.

major dent in the budget — estimated by the CBO as $2 trillion over 10 years.[2] Pandering to middle-income America also comes with a hefty price tag.

Ironically, the weak economic situation prevents Democrats from simply pulling out their majority whips to hold the party line and allow the Bush tax cuts to expire at the end of the year. A sunset provision was included in the original legislation a decade ago because Republicans lacked the necessary 60 votes in the Senate to make them permanent. That has not changed, so Democrats need do nothing to see them expire. The problem is, doing nothing will result in a major tax increase for *everyone*. That's why congressional Democrats (especially those running for reelection) preferred to let the matter rest until after the November midterm elections. Since the ''Summer of Recovery'' came and fizzled, and things do not look much better during this ''Fall of Anemic Economic Growth,'' prudence dictates against raising taxes in the midst of our coming ''Winter of Double Dip.'' Even Democrats understand this much economics; doing nothing is the worst possible option. But taking *any* positive action will require some measure of compromise among congressional policymakers, and that is a rare commodity today. But who knows? Conservative Democrats (are there any Blue Dogs left out there?) who are willing to accept a temporary extension of the tax cuts might join with those pragmatic Republicans who will take whatever they can in the way of lower marginal rates — even if for just two years. The political center could find ground for compromise.

The debate is complicated by the uncertainty attributable to the recent midterm elections. Congress held off taking up the issue until the matter of which party will control the national legislature was settled. Starting in January, we will have a divided government, with Republicans in control of the House and Democrats retaining control of the Senate — and of course, President Obama still in the White House. Neither party will be strong enough in the 112th Congress to force the issue. That is a prescription for deadlock, and the country is likely better off for it.

Whatever the outcome in the fall 2010 battle over marginal tax rates, the war will not end anytime soon. Just as the tax cuts enacted by Republicans in 2001 and 2003 were never written in stone (and in fact, were apparently written on disappearing ink), neither will the outcome of the current struggle settle the matter. Unless we soon enter some new Era of Good Feelings,[3] the struggle will continue between those who favor lower marginal tax rates (read my lips: lower taxes for the wealthy) and those dedicated to ''soaking'' the heck out of the rich, regardless of the impact on the economy. Absent a ''critical realignment'' and the birth of a new ''party system'' (terms political scientists use to describe the kind of major electoral shift that last occurred in 1932 and will never happen again), we should expect that any compromise reached in the next month or two will be temporary and undone by whichever party gets the upper hand in the next decisive national election.

As we watch the current jousting, it is useful to situate the politics of marginal tax rates in a broader historical context. In some respects, we can trace the conflict back to the enactment of the modern income tax in 1913 following the ratification of the 16th Amendment. (Yes, tax protesters, the 16th Amendment really was ratified and is part of the U.S. Constitution.) But more accurately, the current war over marginal tax rates began in January 1947 with the opening of the infamous 80th Congress and its contentious confrontation with President Truman. What we are witnessing today in Washington is just the most recent skirmish in a long war that has been playing out since the end of World War II. Absent some grand compromise, the eternal struggle between the haves and the have-nots will continue to shape tax policy. Since the haves (the top 5 percent of taxpayers — those who actually pay most of the taxes) are by definition a minority, Democrats cannot resist the urge to pander to the have-nots, who, after all, constitute the vast majority of the electorate and do not bear that much of the tax burden. As George Bernard Shaw once observed: ''A government which robs Peter to pay Paul can always depend upon the support of Paul.''[4] There are a whole lot of unemployed Pauls out there who will vote to tax their wealthy neighbor, Peter. So a permanent agreement on marginal tax rates would be nothing short of a miracle. The best we can do is find a political equilibrium on marginal tax rates — rates that majorities in both major political parties can live with for more than a single tax season. (Forget about the Libertarians or

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[2]*Id.*

[3]The so-called Era of Good Feelings was the period of political hegemony by Democratic-Republicans following the War of 1812. Justin Crowe recently described this period more accurately as the ''Era of Mixed Feelings.'' Justin Crowe, ''Westward Expansion, Preappointment Politics, and the Making of the Southern Slaveholding Supreme Court,'' *Studies in American Political Development* 24:1 (Apr. 2010): 90-120. Our current political climate is more like the ''Era of Nasty Feelings.''

[4]Bernard Shaw, *Everybody's Political What's What?* 256 (New York: Dodd, Mead 1945).

Tea Partiers; they will never agree to *any* tax rate.) Logically, the compromise rate should lie somewhere between the 35 percent maximum prescribed by George W. Bush and the "millionaires" rate of 39.6 percent worshiped by Democrats. Short of reaching this equilibrium, the long war will continue. And don't expect the partisans to be polite — too much is at stake. If there is any consolation, the acrimony was even worse in the 1940s.

The Infamous 80th Congress

We can trace the war over marginal tax rates to the immediate postwar period. With President Franklin Roosevelt's death in April 1945, Vice President Harry Truman was catapulted to the presidency. Soon after, the Missouri Democrat would face a resurgent Republican Congress hellbent on dismantling the New Deal and withdrawing the extraordinary tax rates enacted during World War II. Republicans were harking back to the period of "tax normalcy" and low taxes of the Coolidge administration in the 1920s. A conservative faction preaching a strong antitax message emerged as the dominant bloc within the party. In the 1946 midterm elections, Republicans took advantage of the electorate's exhaustion with five years of wartime economic controls and extraordinary tax rates. Plus, the Democrat president had an anemic 32 percent approval rating, and Republicans smelled blood. (Sound familiar?) In the midterm elections, Republicans gained control of both houses of Congress for the first time since 1930 and assumed most of the leadership positions and important committee chairs. Political conditions were ripe for a showdown between the 80th Congress and the struggling Democrat administration.[5]

Now in control of the legislative branch, the Republican Party commenced a relentless campaign to roll back the wartime tax rates that were still in effect. During the wartime fiscal crisis, the maximum marginal tax rate had soared to an astounding 94 percent on income above $1 million, and even those on the bottom of the income ladder faced significant tax increases. Predictably, an antitax message reverberated through the halls of the 80th Congress. As soon as the first session of Congress opened, House Ways and Means Committee Chair Harold Knutson introduced a bill calling for a 20 percent reduction in the income tax. The Truman administration rejected that outright and proposed a more modest reduction to be funded by an *increase* in the corporate tax rate. This set off a war between the Republican Congress and the Democrat administration, resulting in Truman vetoing three Republican tax reduction bills.[6] The third time was the charm, as a coalition of Republicans and conservative Southern Democrats came together to override Truman's veto. The Republican tax legislation, the Revenue Act of 1948, lowered the maximum individual income tax rate to 77 percent. This was considerably less than what conservatives wanted but a victory nonetheless.

Just about everyone expected New York Gov. Thomas Dewey to oust Truman in the 1948 presidential election. But things did not work out that way. To the chagrin of the Republican Congress, the incumbent Democrat was returned to the White House. Despite Truman's electoral victory, conservatives stymied his tax initiatives. All he could do in return was block their efforts to further reduce tax rates. The result was stalemate, as tax rates remained near wartime levels. With the outbreak of the Korean War and the ensuing Cold War, those wartime rates persisted for decades. In fact, in 1954 the maximum rate still stood at 87 percent. The extraordinary tax rates of wartime crisis became the norm. Following all prior American military engagements, wartime tax rates had been returned to prewar levels in short order. Not so following World War II, when wartime rates became a permanent feature of the federal income tax.[7]

Efforts to roll back the wartime rates were unsuccessful largely because the government was still spending at wartime levels — especially on its military. It still is.[8] To his credit, Truman opposed reducing taxes until government spending was also reduced. In the end, neither happened. Rate reduction did not become a hot issue again until the 1960s when President Kennedy proposed tax cuts on the advice of his economic advisers. Their novel idea was that an 87 percent marginal tax rate might actually *stifle* economic productivity. The resulting

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[5]For an excellent summary of the conflict between Truman and congressional Republicans during the 80th Congress, see Anthony Badger, "Republican Rule in the 80th Congress," in Dean McSweeney and John E. Owens (eds.), *The Republican Takeover of Congress*, at 165-184 (1998). I draw on my own study of Republican tax policy in *Refinancing America: The Republican Antitax Agenda* (2003).

[6]In all, Truman exercised his veto power more than 200 times, mostly with respect to tax and labor legislation. The most famous case was Truman's veto of the 1947 Taft-Hartley Act, which Congress overrode.

[7]I have traced the cyclical pattern of tax rates during America's prior wars in *War, Revenue, and State Building: Financing the Development of the American State* (2009).

[8]The United States accounts for 45 percent of military expenditures worldwide — more than the combined military spending of the next 32 nations. This vast sum represents nearly 20 percent of the total outlays of the national government. Stockholm International Peace Research Institute, *SIPRI Yearbook 2008: Armaments, Disarmaments and International Security*, at Appendix 5A (2008).

tax reduction initiative came to a halt with the president's assassination in November 1963; relying on congressional goodwill toward his new administration, Lyndon B. Johnson pushed a tax reduction bill through Congress. Within months, Congress enacted what was then the largest tax cut in American history. The Revenue Act of 1964 dropped the maximum marginal tax rate to 70 percent. The lowest tax rate was reduced from 20 to 14 percent, and middle-income rates also were reduced significantly. The so-called Kennedy tax cut would inspire a generation of Republican supply-siders in the 1980s. Ironically, the greatest success in enacting broad-based tax reduction in the postwar era before this belonged to Democrats rather than to the antitax wing of the Republican Party.

In retrospect, the 1964 tax cuts should be viewed as one more step in rolling back the extraordinary wartime rates enacted during the 1940s. It is hard to believe that reducing the top marginal rate to 70 percent in 1964 was viewed by contemporaries as a major success in rate reduction. After all, 70 percent generally would be considered a wartime rate — and that is where it stood when Ronald Reagan, then-governor of California, mounted his bid for the GOP nomination at the 1976 Republican Convention. That campaign failed, as did Gerald Ford's effort to retain the office he inherited from Richard Nixon. After Ford and his running mate, Robert Dole, were trounced in the November election by Jimmy Carter, Reagan was positioned as the front-runner for the 1980 presidential campaign. In the meantime, Republicans were swamped by the Democrats. Further, conservatives members of the GOP were relegated to the margin during the Carter years as the nation suffered a terrible malaise. That changed when Reagan captured the Republican presidential nomination in 1980 and the antitax wing of the party found its voice.

The Reagan Tax Cuts

Reagan easily defeated Carter and third-party candidate John Anderson. The Gipper carried 44 states and took 489 electoral votes. Republicans also found themselves with their first majority in the Senate since 1954. While Democrats still controlled the House, a contingent of conservative Southern Democrats supported the new administration, so tax reduction was a real possibility. Conservative Republicans were as close to the center of government as they had been in decades, and the antitax wing of the GOP had its first real opportunity to influence domestic policy since the 80th Congress. They made the most of the opportunity.

During the fall campaign, Reagan had endorsed a rate-reduction proposal introduced in 1977 by Sen. William Roth and Rep. Jack Kemp. The Kemp-Roth proposal included a 33 percent reduction for individuals and a reduction of 3 percentage points for corporations. Reagan liked the plan and introduced his own tax reduction proposal. By the middle of the summer of 1981, the Great Communicator had assembled a bipartisan coalition to back a bill for significant tax cuts, enacted as the Economic Recovery Tax Act of 1981 (ERTA). The legislation lowered the maximum income tax rate for individuals from 70 to 50 percent. This was one more step in the long campaign to roll back the wartime rates of the 1940s.

The Republican campaign for tax reduction (which began in 1947 as an attack on the Truman administration and the extraordinary wartime tax rates) became a full-blown economic theory during the Reagan administration. But the victory of supply-side economics was short lived. Almost as soon as ERTA was enacted, forecasts of budget deficits plagued Washington. Estimates for the fiscal 1982 budget projected a $100 billion deficit — an unprecedented figure for peacetime. To make matters worse, the economy slipped into recession by the middle of 1981 and continued to slump during the next year. At the same time, Reagan failed to make good on his promise to cut government spending. In fact, defense spending increased significantly during his administration. That, together with declining government revenues from the tax cuts and the economic slump, produced soaring deficits. Soon, the traditionally fiscally conservative center of the GOP (led in the Senate by Majority Leader Dole and Budget Committee Chair Pete Domenici) reasserted control over the party in Congress. Some in Reagan's own administration pushed for a balanced budget, even if that meant raising taxes. Congress responded with tax increases in 1982, but kept the maximum tax rate for individuals at 50 percent.

Following his landslide reelection in 1984, Reagan turned his attention to tax reform qua rate reduction. In the face of rising deficits, the administration accepted a framework of revenue neutrality for the ensuing tax reform crusade. Against all expectations, a political compromise was reached between supply-siders in the administration demanding lower marginal rates and liberal Democrats pushing for a broader tax base. The two groups came together behind a plan to lower marginal tax rates and close as many tax loopholes as possible. The result of this unusual political coalition was the Tax Reform Act of 1986. TRA 1986 has been widely hailed as the most significant tax reform legislation in the history of the federal income tax.[9] The legislation reduced the maximum tax rate for individuals to 28 percent (to the delight of Republicans) and included numerous reforms favored by Democrats. Overall, TRA 1986 was the most successful restructuring of the federal income tax in its 80-year history.[10]

The Reagan administration reduced marginal tax rates, but contrary to predictions, government revenue declined. Ballooning deficits were attributable to the failure to reduce government spending (especially military spending) as well as the tax cuts enacted in 1981 and 1986. Further, Reagan failed to make a dent in the size of the federal bureaucracy. Few programs were cut; others were created. As a result, the size of the federal government was greater in 1988 — after eight years of Reagan — than it was in December 1980 when Jimmy Carter was still in office. Big government was not cut down to size. At the same time, spending increased, taxes were cut, and federal deficits soared. Supply-siders saddled the GOP with a tainted legacy that it has yet to shed, while the next guy to occupy the White House was left to clean up the economic mess.

Life After Reagan

Coming to office in January 1989, President George H.W. Bush faced the aftermath of the Reagan fiscal policies he had denounced as "voodoo economics." The fiscal 1990 budget he inherited from Reagan turned out to be more than $218 billion in the red. Bush tried to follow the Great Communicator but choked on his own words. First he gave his "Read My Lips: No New Taxes" speech; then it was "Oops, I Changed My Mind" legislation. As deficits soared, the president was forced to accept a political compromise with congressional Democrats. This produced the Omnibus Budget Reconciliation Act of 1990, which abandoned the maximum rate of 28 percent promised by TRA 1986 and raised the top rate to 31 percent. The White House also accepted several provisions that directly targeted high-income taxpayers: a phaseout of personal exemptions and the 15 percent tax bracket, as well as limitations on miscellaneous itemized deductions. This was nothing more than a disguised tax increase for the wealthy; with this tax legislation, Bush alienated his base and doomed his presidency. Bush was turned out of the White House in the 1992 presidential election, and in strolled the former Democrat governor of Arkansas. Democrats soon took their revenge.

The Clinton Tax Increase

During his campaign, Bill Clinton promised that he would lower middle-income taxes. After he won, economic reality caught up with campaign rhetoric as projections of a mounting deficit forced an about-face. The White House let it be known that tax increases would be necessary. In his 1993 State of the Union address, Clinton presented the outline of his new budget plan, which included an assortment of tax incentives, preferences, credits, and rate increases for the wealthy. The president committed to a gimmick popular among Democrats — a so-called millionaires tax, which Clinton transformed into a 10 percent surtax on taxable income in excess of $250,000. Virtually the entire burden of the Clinton tax increase would fall on the wealthiest taxpayers, directly targeting those who had benefited most from the Reagan tax cuts of the 1980s.

As the administration moved forward with its proposal, the level of partisanship and acrimony intensified to 1940s levels. In early 1993 the Ways and Means Committee took up consideration of the president's tax plan, which, to say the least, was not bipartisan legislation. Republicans uniformly opposed the package in committee and voting strictly followed party lines; the bill passed by the narrow margin of 218 to 216. The deciding vote was cast by Marjorie Margolies-Mezvinsky of Pennsylvania (who became Clinton's *machatunim* with the marriage this summer of her son Marc to Chelsea Clinton). The next day, a split vote in the Senate was decided by Vice President Al Gore in his capacity as president of the Senate. The Revenue Reconciliation Act of 1993 was signed into law by Clinton on August 10, 1993. Democrats were delighted.

The Clinton tax increase created a new maximum tax bracket of 36 percent for individuals with income exceeding $115,000, and as promised, imposed a 10 percent surtax on incomes exceeding $250,000. Thus, the new maximum marginal tax rate for the personal income tax was jacked up to 39.6 percent, while the top corporate tax rate was raised to 35 percent. While not entirely reversing the Reagan tax cuts, Clinton's legislation went pretty far in that direction. Other provisions repealed or limited traditional business deductions. After Clinton had his way with the tax code, it became a whole lot more difficult to be rich in America — although because the economy boomed,

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[9]*See, e.g.*, John F. Witte, "The Tax Reform Act of 1986: A New Era in Tax Politics?" 19 *Am. Pol. Q.* 438 (1991): "TRA can only be viewed as a remarkable legislative accomplishment and by far the most radical example of peacetime tax reform in history."

[10]Despite the supposed revenue-neutral framework for tax reform in 1986, the resulting legislation slightly increased the progressivity of the income tax. *See* Henry J. Aaron, "The Impossible Dream Comes True," in *Tax Reform and the U.S. Economy*, Joseph A. Pechman (ed.), at 13-14 (1987).

a whole lot more became rich. Nevertheless, the soak-the-rich philosophy behind the 1993 Democratic legislation was divisive and provoked an equally partisan response by Republicans. The antitax wing of the Republican Party was revitalized, leading to a backlash against Democrats and the resurrection of the Republican Party in the 2000 presidential election.

George W. Cuts Taxes

With the Republican candidate George W. Bush eventually eking out a victory, Republicans took back the White House after an eight-year hiatus.[11] Also, the GOP retained a slim 221-212 majority in the House. This meant that leadership positions and committee chairs would remain in Republican hands for at least two more years. But in the Senate, Republicans and Democrats were deadlocked with 50 votes each. Because Vice President Dick Cheney would inevitably vote with his party in the event of a tie, the Democrats were forced to compromise. A deal was struck under which Democrats would chair Senate committees until the inauguration on January 20, 2001. Thereafter, Republicans would take over the chairmanships; the antitax movement would have to move fast in the 107th Congress if tax reduction was to succeed.

It took no time at all for Bush to make good on his campaign pledge to cut taxes. The president insisted on a tax cut of $1.6 trillion. He got some help in selling his proposal from the CBO, which released its annual budget and economic report in January 2001, forecasting a $5.6 trillion surplus.[12] To Bush, that surplus necessitated "returning to the people their own money." (Unfortunately, not enough thought was given to paying down the staggering national debt instead.) Soon after, Federal Reserve Board Chair Alan Greenspan testified before the Senate Finance Committee that a tax cut might be a good way to stimulate the sagging economy. Noting that economic growth was "probably very close to zero," Greenspan indicated his support for a tax cut. While Greenspan later backed off his subtle endorsement of the Bush tax plan, he gave the president a much-needed boost.

After eight years of Clinton, the GOP's highest priority was tax cuts. In an address to a joint session of Congress on February 27, 2001, Bush revealed his plan for a $1.6 trillion tax cut, and the next day, formally presented the outline for his budget for fiscal 2002. Bush wanted to drop the maximum rate for individuals from 39.6 to 33 percent — repealing most of the Clinton tax increases. The Ways and Means Committee immediately approved a $958 billion, 10-year tax cut implementing the main elements of Bush's plan. One week later, the House took up the Economic Growth and Tax Relief Reconciliation Act of 2001 and quickly approved the bill by a 230-198 vote. Republicans voted unanimously for the tax cut. Ten Democrats supported the bill, which reduced the lowest tax bracket from 15 to 10 percent over six years. The bill also gradually reduced rates for the higher brackets. House conservatives then unveiled their own $2.2 trillion tax cut plan, which included the repeal of the federal estate tax over 10 years, granted relief from the marriage tax penalty, raised contribution limits for tax-deferred retirement accounts, and repealed the alternative minimum tax for individuals. Basically, this was everything antitax Republicans had dreamed of since Truman left office.

While the conservative House rejoiced, the more moderate Senate waited to consider tax cuts until later that spring. The goal was to put a tax bill on the president's desk before Congress recessed for Memorial Day. Eventually, a conference committee worked out the details for a compromise tax bill. The conference committee bill implemented 441 changes to the tax code, affecting the federal gift and estate tax as well as the income tax. This included a new 10 percent tax bracket effective retroactive to January 1, 2001. The maximum tax rate was scheduled to fall to 35 percent by 2006; reducing the tax brackets carried a cost of $842 billion over 11 years. At least no one pretended it would raise revenue.

Undoubtedly, the most peculiar feature of the bill was a sunset provision for the tax cuts. As everyone knows by now, virtually the entire tax bill is set to expire at midnight on December 31. Under the legislation, the estate tax was reduced over eight years, repealed in the ninth year (2010), and reinstated in the 10th year (2011). This was necessary to keep the $1.25 trillion tax reduction package from running afoul of the Senate budgetary procedure known as the Byrd rule, which requires 60 votes to overcome a point of order raised against legislation that reduces revenue *beyond* the 10-year time frame of budget resolutions.[13] Republicans had a majority in the Senate to pass the Bush tax cuts, but not the

[11]The following account of the Bush tax cuts is drawn from my study, *Refinancing America: The Republican Antitax Agenda* (2003).

[12]CBO, "The Budget and Economic Outlook: Fiscal Years 2002-2011" (Jan. 2001), *Doc 2001-3113, 2001 TNT 22-20*. Of this total surplus, $2.6 trillion was projected to come from the Social Security Trust Fund.

[13]For a description of the sunset provision, see the Joint Committee on Taxation, "Summary of Provisions Contained in the Conference Agreement for H.R. 1836, the Economic Growth and Tax Relief Reconciliation Act of 2001," JCX-50-01 (May 26,

(Footnote continued on next page.)

60 votes necessary to survive a point of order. Further, Republican leaders were under great pressure to keep the 10-year cost of the bill down — hence, the sunset provision. Of course, this meant from the onset that the Bush tax cuts would only be *temporary*. The expectation was that a future Republican Congress would reenact the legislation sometime in the next 10 years, which, as fate would have it, never happened. Republicans lost control of both houses of Congress as well as the White House by the end of the decade.

Still, it was a victory. The Bush administration shepherded through Congress the first major tax reduction legislation in 20 years. The battle was won, even if the war was not yet over. All things considered, this was great victory for the antitax movement. But Bush was not finished cutting taxes.

More Tax Cuts in 2003

Following the enactment of the May 2001 tax cuts, the U.S. economy slumped. With economic growth close to zero, tax revenue fell. In August 2001 the CBO predicted a $9 billion on-budget *deficit* for the fiscal year and a reduced on-budget surplus of $847 billion for the 10-year period from 2002 to 2011. The CBO estimated the consolidated surplus for the 10-year baseline at $3.4 trillion — $2.2 trillion less than the $5.6 trillion surplus CBO had predicted only three months earlier.[14] This significant reduction in the projected 10-year surplus was attributable to the combination of tax cuts, spending increases, and the stagnant economy. The first wave of tax cuts implemented under the 2001 tax act failed to produce any discernable impact on the economy. The September 11 terrorist attacks pushed the economy toward recession. The stock market sank and the economy tanked. Reduced revenue translated into big deficits. So what did Republicans do? Surprise, surprise: They proposed a new round of tax cuts to stimulate the economy even as the country adopted a wartime footing.[15]

The Bush administration pushed for additional tax cuts, culminating in the Jobs and Growth Tax Relief Reconciliation Act of 2003. Among other things, the legislation accelerated the tax cuts adopted in 2001. The 35 percent maximum rate not scheduled to be phased in until 2006 was suddenly made effective retroactive to January 2003. Reduced capital gains rates were similarly accelerated. But the ticking time bomb remained, as the whole package of tax cuts enacted in both 2001 and 2003 was left to expire on December 31, 2010. Would there be a Republican savior, or would tax rates return to the ''soak the rich'' levels of the Clinton era? The 2008 election answered that question rather definitively, but the midterm elections just confused the whole situation again.

Where Do We Stand Now?

So here we are, waiting for the Bush tax cuts to expire at year's end and arguing over a ''just right'' rate for a tax that we have lived with for nearly a hundred years. You would think we could agree on a rate structure by now. Do we really want tax rates to shift with the political wind every few years? Is this any way to run a tax system? Most tax professionals have strong reservations. Estate planners have had a hard time the last few years advising clients when to die. We do not even know if there is an estate tax *this* year (more than three-quarters of the way through), let alone what it will look like next year. Even worse, entrepreneurs do not know if they should be economically productive next year (that is, respond to a 35 percent maximum rate by working extra hard) or goof off in the face of a new 39.6 percent rate. (I seem to recall that they worked pretty hard following the Clinton tax increase in 1993, and the economy boomed. But let's not get into that now.)

So where does that leave us? Perhaps before recessing this year, Congress should adopt a maximum marginal rate of 37.3 percent and declare a truce. That rate is precisely what Bush and congressional Republicans should have pursued in 2001 when they had the votes. And with a maximum rate of 37.3 percent, they just might have convinced 60 senators to vote for a *permanent* rate reduction instead of settling for a 10-year experiment with a 35 percent rate. If we are lucky, Obama and outgoing House Speaker Nancy Pelosi, D-Calif., have learned the lesson: Settle now on a maximum rate of 37.3 percent instead of gambling that Democrats can hold on to a 39.6 percent maximum next year. If they do not compromise now, things will only heat up in January with the opening session of the 112th Congress — when the 80th Congress finally gets its revenge.

2001), *Doc 2001-15168*, *2001 TNT 104-8*. The Byrd rule is described in Allen Schick, *The Federal Budget: Politics, Policy, Process*, at 85 (1995).

[14]CBO, ''The Budget and Economic Outlook: An Update'' (Aug. 2001), *Doc 2001-22736*, *2001 TNT 168-12*.

[15]The unprecedented wartime tax cuts enacted by the Bush administration and the Republican Congress following the post-September 11 military buildup in Iraq and Afghanistan are critically evaluated in Steven A. Bank, Kirk J. Stark, and Joseph J. Thorndike, *War and Taxes*, at 145-165 (2008).