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On the Constitutionality of Tax Treaties
Rebecca M. Kysar

Taxes kindled the American Revolution. Revolt against collecting revenues without representation caused a tea party, propelling the colonies toward convening the First Continental Congress. Forgotten, though, is the role of taxes in shaping our fledgling nation immediately after the Revolution. Control over which governmental body could impose taxes inflamed the delegates to the Constitutional Convention. So important was the issue that the decision to originate revenue bills in the lower house of Congress constituted a cornerstone of the Great Compromise, thus birthing the representational structure of our country. This principle became embodied in the Constitution as the Origination Clause, ensuring that the power to tax would begin with the house that was directly elected and proportionate to the population.

Tax treaties (generally, bilateral instruments that mitigate or eliminate double taxation of income across jurisdictions) upset this carefully constructed intra-congressional balance. Because tax treaties are self-executing, meaning that they need no implementing legislation to take legal effect, the ratification of a tax treaty cuts the House of Representatives out of the process of legislating in the area of international taxation. This outcome, I argue, lies in derogation of the Origination Clause. Contrary to current practice, constitutional text, structure, history, and precedent, as well as normative considerations, mandate that tax treaties be implemented or approved through legislation passed by both houses of Congress.

Features of today's tax legislative and treaty environment have made the democratic concerns underlying the Clause even more acute—in sharp contrast to those concerns motivating the exclusion of the House from the Article II treaty process, which have fallen away in modern times. Involvement of the House would legitimize the tax treaty process through enhanced democratic representation, increased deliberation, and the reduction of special interest deals. These remedies would also breathe life into the process, the paucity of which has enabled tax treaties' circumvention of budgetary rules and has stymied discussion of purposes currently framed in century-old terms. Additionally the prescribed remedies allow the United States not only to honor its Constitution, but also to better uphold its obligations under international law by increasing the durability of its international commitments, creating more certainty for public and private actors. Finally, this analysis makes important contributions beyond...
The context of tax treaties by shedding light on the vexing questions of whether and when the Constitution limits the reach of treaties and when, as a constitutional matter, treaties can or cannot be self-executing.

The Crime and Punishment of States

Gabriella Blum

Why is it that we no longer punish states, or, at least, do not admit to doing so? The moral rhetoric of "crime" and "punishment" of states has been excised from mainstream international law, and replaced with an amoral rhetoric of "threat" and "prevention." Today, individuals alone are subject to international punishment, while states are subject only to preventive, regulatory, or enforcement measures.

Through a historical survey of the shift from punishment to prevention in various spheres of international law, I argue that the preference for prevention has been motivated by a strong preference for peace over justice as the ultimate goal of the international system. Driving this belief, I suggest, is an array of considerations, correlating punishment with humiliation and revenge, fearing the effects of collective punishment, doubting the operation of punishment in a decentralized structure built around the principle of sovereign equality, and bemoaning the absence of an international institution to adjudicate the criminality of states. However, given existing practices under the paradigm of "prevention," none of these considerations seems to justify a correlation between peaceful coexistence and an aversion to punishment.

Further, the elimination of a punitive paradigm may implicate normative concerns, even accepting the preference for peace: in fact, a prevention-oriented framework may have its own distorted effects for international peace and security. Drawing on debates over preventive sanctions in U.S. domestic criminal law, I argue that even though prevention may sound like a less oppressive policy than punishment, it may in fact be far less constrained and more ruthless. At the same time, a preventive paradigm might be paralyzed from operating where there is a crime that does not immediately threaten other international actors. I demonstrate both possibilities using the contemporary debates over anticipatory self-defense and humanitarian intervention.

The Power To Detain: Detention of Terrorism

Oona Hathaway, Samuel Adelsberg, Spencer Amdur, Philip Levitz, Freya Pitts & Sirine Shebaya

Since the attacks of September 11, 2001, the United States has used the detention of suspected terrorists as a key element of its counterterrorism operations. Yet the sources of the U.S. government's authority to detain suspected terrorists—and the limitations on that authority—remain ill defined. This Article fills that gap by clarifying the reach and limits of existing sources of U.S. government detention authority for counterterrorism purposes. It offers a comprehensive overview of the sources of government authority to detain terrorism suspects in law of war detention, including statutory and constitutional authority. It shows, moreover, that this authority is limited not only by its own terms but also by the law of armed conflict and human rights law. The Article then examines criminal law detention as an alternative to law of war detention for terrorism suspects. It argues that criminal law detention and prosecution of terrorism
suspects can produce better predictability, legitimacy, and flexibility than law of war detention and prosecution. In most cases, therefore, suspected terrorists can and should be charged and prosecuted within the federal criminal justice system. Doing so is not only more consistent with U.S. legal principles and commitments, but is also the most promising way forward in the fight against terrorism.

Note

When Does Internet Denial Trigger the Right of Armed Self-Defense?

This Note examines the international law of cyber-warfare. It identifies the conditions under which a distributed denial-of-service (DDoS) attack may qualify as an “armed attack” under various international legal instruments, including Article 51 of the U.N. Charter and Article 5 of the North Atlantic Treaty. By analogizing DDoS attacks to naval blockades, the Note offers new insights whose implications are set in stark relief against real-life events, particularly the 2007 DDoS attacks against Estonia. As critical infrastructure is more digitized than ever before, and as the distinction between hacks and attacks breaks down, the Note examines when, whether, and how a state may respond militarily in self-defense to a breach of cyber-security, grappling with an urgent, emerging question of international law.
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