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Return of the Cybertax

Lamar Alexander's Anti-Federalism

By George Pieler

Thanks to Sen. Lamar Alexander and a group of former Governors in the Senate, the states now have power to tax your access to the Internet. Sen. Alexander's blocking move prevented the Senate from extending the Internet Tax Moratorium that has been standard public policy under both the Clinton and Bush administrations. By asserting state primacy over telecommunications policy and e-commerce, Alexander and his allies are substituting their own twisted constitutional construction for the wisdom of the Founders.

The Revenuers Strike Back

Last year the House of Representatives approved HR 49, making the Internet Tax Moratorium permanent, and end the 'grandfathering' of states that had taxed internet access prior to enactment of the original (1998) moratorium. The Senate was preparing to move on similar legislation when Sen. Alexander and friends raised the banner of states' rights, claiming the extended moratorium would decimate state finances and trample on state's rightful powers under our federal system. Alexander claims he just wants a scaled-back, short-term extension of the Internet Tax Moratorium. [1]

So long as the Internet Tax Moratorium was the law of the land, proponents of broadening the reach of state taxation had a serious tactical problem. Removing that legal barrier provides a window for state and local tax-raisers to seize the revenue streams generated by the Internet and e-commerce.

So much for the political state of play. How about the merits of the Alexander argument that the federal government should defer to the states on the subject of internet taxation and electronic commerce?

Slippery Constitutional Footing

Sen. Alexander has essentially three arguments: first, that the proposed Internet Tax Moratorium extension goes too far by clarifying the definition of what constitutes a tax on internet access; second, that the moratorium will cost the states too much revenue by limiting their taxing power; and third, that the Constitution reserves to the states the right to make these kinds of taxing decision, and the federal government is overreaching by trying to legislate away that 'right.'

The real blockbuster is Sen. Alexander's constitutional case, suggesting that an Internet Tax Moratorium is, if not beyond the power of Congress, at least an imprudent and excessive preemption of state legislative authority. As Sen. Alexander said on November 7, 2003, "Article 1, Section 8 [of the Constitution] says 'Congress has the power to regulate commerce among the states,' but it doesn't say exactly what to do about it. It means Congress can impose some limits. It can do some things."

Alexander then points out "another provision called the 10th Amendment, which reserves all powers to the state unless they are specifically delegated to the Congress." This reference was presumably designed to excite federalists, conservatives, and strict constructionists, who have long complained that modern federal jurisprudence has eviscerated the 10th Amendment's broad reservation of powers to the states.

Unfortunately for Sen. Alexander, this is exactly the point where his arguments fall into the vast swamp of constitutional misinterpretation. As the good Senator himself says, the unquestioned *exception* from the 10th Amendment's reservation of state powers is the case where powers "are specifically delegated to the Congress." And as the Senator himself already pointed out, one such specific delegation…probably the most powerful delegation of power to Congress…is that very Article 1, Section 8 'power to regulate commerce among the states' which Alexander professes not to understand very well.

That internet access and internet commerce are major components of interstate commerce does not seem to be in dispute: Sen. Alexander himself conceded (also on November 7, 2003) that "Virtually all of us are willing to keep state and local governments from taxing Internet access." So it is O.K. for the federal government to bar states from taxing Internet access, as long as it does not go too far? Clearly if Sen. Alexander truly had constitutional concerns in mind, he could not set down such a flexible standard of what constitutes appropriate federal power.

A Prudent Balancing

The debate between Lamar Alexander and the foes of Internet taxation, then, is over what policy represents a prudent congressional exercise of the commerce power. Alexander says the ban on Internet taxation is an extraordinary intrusion: "we don't tell state and local governments what to do about their tax policy for [other] … businesses." This argument is silly. The issue is about the best federal policy vis-à-vis state Internet taxation, not about limits Congress is *not* imposing with regard to other state taxing authorities.

The Internet has been a tremendous catalyst for economic growth, technological innovation, and enhanced productivity that benefit all Americans. Former Virginia Gov. James Gilmore made a salient point last year before the House Judiciary Committee, noting that "Abolishing the federal prohibition [on Internet taxation] would force the Internet superhighway to navigate the same labyrinthine maze of overlapping and disparate state and local tax regulations and burdens that currently strangles the Nation's telecommunications services." [2] For the benefit of Sen. Alexander, that means that just because Congress and the States messed up telecom taxation, they don't have to mess up Internet taxation the same way!

The Alexander Internet Tax gambit is another unfortunate example of using false federalism to push an agenda. In 2003 the FCC completed its Triennal Review of basic telecom policy on 'bundled' services. In that Review the Commission decided to devolve most regulatory decisions to the states rather than follow its judicial mandate and firm up a national deregulatory policy for telecommunications. Their rationale? States' rights! But localized regulation of inherently national markets (and enterprises) is no way to honor the founders' vision of true federalism.

Consider these words written to George Washington on the eve of the Constitutional Convention (April 16, 1787): "I would propose next that in addition to the present federal powers, the national Government should be armed with positive and compleat authority in all cases which require uniformity; such as the regulation of trade, including the right of taxing both exports & imports, the fixing the terms and forms of naturalization, &c &c."

"Over and above this positive power a negative *in all cases whatsoever* on the legislative acts of the States… appears to me to be absolutely necessary, and to be the least possible encroachment on the State jurisdictions. Without this defensive power, every positive power that can be given on paper will be evaded & defeated. The States will continue to invade the National jurisdiction … & to harass each other with rival and spiteful measures dictated by mistaken views of interest." The author? James Madison, the Patron Saint of federalism and champion of *limited* national government.

So by forcing us to reexamine the constitutional basis of federalism. Sen. Alexander has simply reminded us that establishing national policy on Internet taxation is the quintessential exercise of the commerce power as crafted by the Founding Fathers. Ironically, since Congress adjourned for 2003, the Supreme Court of Lamar Alexander's beloved Tennessee has struck down that state's own authority for taxing Internet access on a 'grandfathered' basis. [3] Now there's an appropriate exercise of a state's power that the Federal government can learn from!

[1] Sen. Alexander has since given his narrow view of limiting Internet taxes legislative form as S. 2084, introduced February 12, 2004. S. 2084 would revive the Internet Tax moratorium for two years but in severely limited form, and continue protecting states that had started taxing the Internet before the moratorium clicked in.

[2] Testimony of The Honorable James S. Gilmore, III, House Committee on the Judiciary, April 1, 2003 (H.R. 49)

[3] The case is *Prodigy Services Corporation v. Ruth E. Johnson, et al.*, Case No. 98-1051-111 (Tenn.

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