

## Tax Policy in the 21st Century: Challenges and Changes from the Time of Larry Woodworth

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**Ohio Northern University  
Law Review**

**Woodworth Memorial Lecture**

**Tax Policy in the 21st Century: Challenges and Changes  
from the Time of Larry Woodworth<sup>1</sup>**

THOMAS A. BARTHOLD<sup>2</sup>

It is a great honor to deliver the Laurence N. Woodworth Memorial Lecture. Dr. Woodworth served the United States Congress for 33 years on the staff of the Joint Committee on Taxation, the last 13 as Chief of Staff. He is well recognized for his broad expertise that faithfully served members of both parties. Perhaps the signature achievement of his tenure as Chief of Staff was the Tax Reform Act of 1969.

With President Obama establishing the National Commission on Fiscal Responsibility and Reform to examine Federal spending and taxation, and with recognition that the generational wave of major tax overhaul of 1939 to 1954 to 1969 to 1986 is probably overdue, I have decided to take as my theme for tonight the challenges for tax policy makers in the 21<sup>st</sup> Century and perhaps contrast those to the time of Dr. Woodworth. At their broadest level, the challenges for the tax policy maker are universal and timeless – to create a revenue system that balances the inherent tradeoffs between the competing policy goals of efficiency, equity, and simplicity. The challenges I will discuss are the additional challenges that the policy makers may face due to the times and process within which they must legislate.

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1. Laurence Neal Woodworth Memorial Lecture, May 6, 2010.

2. Chief of Staff, Joint Committee on Taxation, United States Congress. These remarks are mine alone and should not be construed as representing the views of any Member of the United States Congress or the views of the staff of the Joint Committee on Taxation. I thank Yigit Bozkurt, Joseph Nega, Harold Hirsch, and Melissa O'Brien for their tax legislative history research. I also thank Bob Shapiro and Albert Buckberg for help in understanding the legislative process in Dr. Woodworth's time.

While several of you in the audience were his friends and colleagues, I never met Dr. Woodworth. I have tried to draw on some of their expertise, but I am sure I will not fully capture the context of Capitol Hill in the 1960s and 1970s in my comparison. They tell me the times were different. The process was different. I hope to explore how the fact that the times were different and the process was different creates challenges for policy makers, because most observers assert that the outcomes were different.

Tax policy observers of the 1960s and 1970s rightfully make a claim that the Tax Reform Act of 1969<sup>3</sup> was the “gold standard” for tax reform legislation and the “gold standard” for the way to develop tax legislation. The next generation of tax policy observers makes a strong case for the Tax Reform Act of 1986 as equaling that gold standard in process and outcome. A common element in each case was a deliberative and collaborative process within the Congress.

The Ways and Means Committee held full committee hearings on H.R. 13270, which became the Tax Reform Act of 1969, for 30 days between February 18 and April 24, 1969. Ways and Means held markups between April 29 and August 2. The Senate Finance Committee held full committee hearing for 23 days (September 4 through October 8) followed by 16 days of markup (October 9 through October 31). In a similar vein 16 years later the Ways and Means Committee held 31 days of full committee hearings and 12 days of subcommittee hearings on what was to become the Tax Reform Act of 1986. Ways and Means spent 27 days in markup. The Senate Finance Committee held 36 days of full committee hearings, six days of subcommittee hearings and spent 17 days in markup.

Let me add here that for a 21<sup>st</sup> Century staffer, such as me, who spent 65 hours across eight days of healthcare reform markup in the Finance Committee, those figures from 1969 and 1986 represent an incredible time commitment to the process of reform on the part of the policy makers. And, system overhaul was close to the sole focus of the tax writing committees and Dr. Woodworth’s staff in 1969. There was no other tax legislation of note.<sup>4</sup> The time commitment of the members of the tax writing committees kept a focus on the big picture of tax reform. This is not to say that the results of the legislation were the dream outcome of economists such as a Joe Pechman or of a Stanley Surrey-trained tax theorist. The legislation was crafted in a political environment and political tradeoffs were made, but by

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3. Tax Reform Act of 1969, Pub. L. No. 91-172, 83 Stat. 487 (1969).

4. This was slightly less true of the 1986 Act as the Congress also produced the SuperFund legislation in 1986 with a significant tax title. *See* Superfund Revenue Act of 1986, Pub. L. No. 99-499, § 501 100 Stat. 1613, 1760-1781 (1986).

and large the resulting legislation had a cohesiveness born of a deliberative, comprehensive review of the prevailing system.

The past decade has witnessed a different approach to developing tax policy. Let me crudely characterize the development of tax policy for the past decade as legislation by crisis, legislation by topic, or legislation by political commitment. These labels are not pejorative. In a representative democracy we want our elected policy makers to respond to the needs of their constituents.

Crisis has motivated some tax legislation. The American Jobs Creation Act of 2004<sup>5</sup> was the response to a trade challenge brought by the European Union against the Foreign Sales Corporation tax regime of Code sections 921-927.<sup>6</sup> Absent a response, significant tariffs would have been imposed on U.S. exports. The tax title of the American Recovery and Reinvestment Act of 2009<sup>7</sup> was the new Obama Administration's and Congress's response to the most severe recession in more than half a century.

Of course, tax legislation occurred in response to crisis in Dr. Woodworth's day as well. The Kennedy round of tax reductions for individuals and business was undertaken to spur an underperforming economy. However, in more recent times we may see a greater number of examples of tax legislation borne of crisis. The Housing Assistance Tax Act of 2008<sup>8</sup> was motivated by the economic collapse in the housing sector. This was followed in 2009 by the Worker, Homeownership, and Business Assistance Act of 2009<sup>9</sup> as Congress attempted to address the continuing weakness in housing markets. The devastation of hurricanes set in motion the tax changes of the Katrina Emergency Tax Relief Act of 2005<sup>10</sup> and the Gulf Opportunity Zone Act of 2005<sup>11</sup> and tornados and floods led, in part, to the Emergency Economic Stabilization Act of 2008.<sup>12</sup>

Broad policy concerns within the electorate and its elected representatives have led to legislation by topic, something I do not believe happened much in Dr. Woodworth's day.<sup>13</sup> In Dr. Woodworth's day the

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5. Pub. L. No. 108-357, 118 Stat. 1418 (2004) [hereinafter AJCA].

6. Technically, AJCA was the second attempt at resolving the trade dispute. AJCA repealed the "extra territorial income" regime which was the short-lived initial replacement of the FSC regime.

7. Pub. L. No. 111-5, 123 Stat. 115 (2009) [hereinafter ARRA].

8. Pub. L. No. 110-289, 122 Stat. 2654 (2008).

9. Pub. L. No. 111-92, 123 Stat. 2984 (2009).

10. Pub. L. No. 109-73, 119 Stat. 2016 (2005).

11. Pub. L. No. 109-135, 119 Stat. 2577 (2005).

12. Pub. L. No. 110-343, 122 Stat. 3765 (2008).

13. Creation of the Airport and Airways Trust Fund would be a counter example as would be the Employee Retirement Income Security Act of 1974. See Airport and Airway Development Act of 1970, Pub. L. No. 91-258, 84 Stat. 219 (1970); see also, Employee Retirement Income Security Act of 1974, Pub. L. No. 93-406, 88 Stat. 829 (1974).

Ways and Means Committee and the Finance Committee were not often party to legislation receiving joint or sequential referral to other committees of jurisdiction. They did tax in the context of doing tax. The process is often different today. Concerns regarding the nation's energy policy resulted in substantial legislation in 2005 (the Energy Policy Act of 2005) which included a significant tax title.<sup>14</sup> Reform of agriculture policy in 2008 also carried with it a tax title (the Food, Conservation, and Energy Act of 2008).<sup>15</sup> Legislation related to our nation's military engagements in Iraq and Afghanistan produced tax policy changes related to the military in the Heroes Earnings Assistance and Relief Tax Act of 2008.<sup>16</sup> Of course this year, the Patient Protection and Affordable Care Act,<sup>17</sup> health care reform, included a significant tax title. Deliberations related to climate change legislation may result in more tax legislation.

A third change from Dr. Woodworth's time is the importance of national campaign promises related to tax legislation. President George W. Bush campaigned on a package of individual income tax rate reductions. President Obama campaigned on the "Making Work Pay Credit" and the "American Opportunity Credit." Congressional Republicans campaigned in 1994 on their "Contract with America." Each of these national campaign promises became part of a significant legislative tax policy initiative. In Dr. Woodworth's day this was not very common, though President Carter railed against the three martini lunch during the 1976 campaign.

Clearly the process for the development of major tax policy in recent times has been different. Almost by definition legislation driven by crisis cannot be deliberative. This is not completely true, as the American Jobs Creation Act of 2004, which as I noted was borne of crisis, was two or more years in development. (A slow moving crisis.) The American Recovery and Reinvestment Act of 2009 was developed substantially between President Obama's election in November 2008 and mid-February 2009. The Katrina Emergency Tax Relief Act of 2005 and the Gulf Opportunity Zone Act of 2005 were enacted roughly within three months of the devastating hurricanes.

Legislation by crisis generally will not be comprehensive. The public policy demand is not for comprehensive deliberation, but for quick action in response to the particular crisis. Likewise, legislation by topic, while it can

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14. Pub. L. No. 109-58, 119 Stat. 594 (2005).

15. Pub. L. No. 110-246, 122 Stat. 1651 (2008).

16. Heroes Earnings Assistance and Relief Tax Act of 2008, Pub. L. No. 110-245, 122 Stat. 1624 (2008).

17. Patient Protection and Affordable Care Act. Pub. L. No. 111-148, 124 Stat. 119 (2010).

be deliberative, by definition, it is not comprehensive. What challenges do legislation by crisis and legislation by topic create for tax policymakers?

When policymakers do not take a comprehensive look at the totality of tax policy but rather narrow their attention to how is the agriculture sector taxed or how is the energy sector taxed or how can tax policy encourage urban economic renewal, it has to be difficult to keep one's eye on the big picture. You might observe, "Isn't it the job of the staff of the Joint Committee on Taxation and Treasury's Office of Tax Policy to keep an eye always on the big picture and make that a staff resource available to the policymakers?" Dr. Woodworth's friends and colleagues tell me that he always had the big picture in his head. Perhaps the current staff is not up to Dr. Woodworth's standards, but I would like to suggest that even if the staff keeps that big picture in mind, the political realities of legislation by crisis and legislation by topic can make it more difficult to effectuate the big picture. Legislation in a democracy ultimately requires compromise. As the Congress moves from topic to topic, or responds to crisis, the Members at the negotiating table will change and the consistency of tax policy outcomes is more likely to be lost.

Legislation by political promise also changes the process from that of earlier days. In Dr. Woodworth's time there was more cross aisle collaboration and more attempts at compromise. Today, tax policy in major national campaigns has become more of a political issue. There are many more party line votes in tax markups than in Dr. Woodworth's day. Commitment to a political promise reduces the odds of compromise. Legislation based on commitment to political promise need not be less deliberative or cohesive than in Dr. Woodworth's day, but it represents a change in the tax legislative process that creates a challenge to policymakers. In Dr. Woodworth's first year on the Joint Committee staff (1944), President Roosevelt vetoed a major tax bill.<sup>18</sup> And, President Truman vetoed two individual income tax reduction bills.<sup>19</sup> There was not another veto of major tax legislation until President Bush vetoed two substantial tax bills in 1992. President Clinton vetoed a handful of tax bills.

The process and the context of crafting tax legislation are different from the time of Dr. Woodworth in other smaller ways. The markup process in Ways and Means and in the Finance Committee for the Tax Reform Act of

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18. In February 1944, the House and Senate overrode President Franklin D. Roosevelt's veto of the Revenue Act of 1943, marking the first time in U.S. history that Congress enacted a revenue law without presidential approval.

19. President Truman vetoed H.R. 3950 which reduced individual income tax payments in July 1947. The veto was sustained by the Senate. In April 1948, President Truman vetoed the Revenue Act of 1948 (H.R. 4790) which reduced individual income tax payments. Congress overrode the veto.

1969 generally involved markup sessions from 10 a.m. to noon or shortly thereafter, followed by the staff trooping to the offices of the legislative counsel to draft the statutory language in the afternoon. Issues that arose in drafting could be brought to the attention of the members in markup the following day. With multi-day markup of the legislation in Ways and Means followed by the same procedure in the Finance Committee sometimes weeks later, there would be time to correct many drafting errors or inadequacies before the law was enacted.

Today, under House rules, Members must start from statutory language, which may be the result of many days of work and even public comment, but there is not the same process of internal committee review of the result of any amendments that might be adopted. On the other hand, the public availability of legislative language prior to a markup increases the technical review that the draft may receive. By comparison, the Finance Committee may hold conceptual markups where the statute may not be available until the committee report is filed. The old timers assert there were fewer technical corrections required in the old days. This process change is another example of what appears to be a less deliberative approach, or a more hurried approach, to tax legislation in the current day.

In Dr. Woodworth's day all markup sessions, except for a final session to vote to report a bill, generally were held in executive session. Today all markups are open to the public. Some observers suggest that executive session fostered more compromise and a more collaborative process. These observers assert that open session and recorded votes make deviating from a previously stated position more costly for the policymaker.

Another aspect of the closed markup sessions was that taxpayers who might be adversely affected by proposed changes in law often did not know the specifics of the proposed change. The chairman and ranking member would hold a joint press conference after the markup session explaining what they thought the committee had accomplished in that session, but no written descriptions of the changes was made available and there was no statutory draft available to parse. Members generally respected the nature of the executive session and would not reveal how another Member may have voted on a particular issue. This would make it more difficult for potentially affected taxpayers to organize opposition to a proposed reform. Do the more open process rules of today pose a greater challenge for tax policymakers by potentially making a tough vote or compromise more costly?

I have emphasized the role of compromise and consensus in Dr. Woodworth's day. Some of that, no doubt, was accomplished by the traditional political means of logrolling. In Dr. Woodworth's day "rifle shots" were accepted legislative practice in the tax policy process, often

tucked away off Code. Similarly, the tax writing committees spent time marking up and reporting “member bills.” In Dr. Woodworth’s time, advancing rifle shot tax relief or advancing a member bill (even if it did not pass the other house) could provide the basis for agreement on a larger tax policy issue.

Consistent with the public’s demand for more openness in the legislative process, there have been very few provisions that could be interpreted as rifle shots since Donald Barlett and James Steele won a Pulitzer Prize for the *Philadelphia Inquirer* for their exposé of special interest legislation in the Tax Reform Act of 1986 and in subsequent legislation in 1987. There has not been a “member day” in Ways and Means in the last 15 years that I can recall. Does shutting off the outlet of rifle shots force policymakers to craft tax policy outcomes that are different from what they might have been?

Another significant process change from Dr. Woodworth’s time is the budget environment in which tax policymakers must operate. In Dr. Woodworth’s time there was no Gramm-Rudman-Hollings Balanced Budget Act.<sup>20</sup> There was no Byrd rule.<sup>21</sup> There was no Statutory PayGo.<sup>22</sup> That is not to say that Members and the public did not care about deficit finance. The Federal government operated annually at a deficit throughout Dr. Woodworth’s time as Chief of Staff. However, perhaps just as important as the budget rules, in Dr. Woodworth’s time tax policymakers could operate with the help of the inflation tax. Prior to the Economic Recovery Tax Act of 1981 the individual income tax was not indexed for inflation. Even moderate inflation produced rapidly increasing revenue from a Code with fixed nominal exemptions, fixed nominal bracket breakpoints, and increasing marginal tax rates. The nominal value of tax receipts could be cut and reforms could be paid for without markedly raising anyone’s nominal tax liability with the proceeds of the inflation tax. Inflation may have helped provide the grease for the political wheels. The challenge in Dr. Woodworth’s time was to spend the inflation tax wisely.

Today in some respects inflation has the completely opposite political effect within the individual income tax. The regular tax is indexed and the alternative minimum tax (AMT) is not. Inflation drives more taxpayers onto the AMT. The public has let Members know that this is not an outcome they like. The negative political effect of the inflation tax provided

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20. See Gramm-Rudman-Hollings Balanced Budget and Emergency Deficit Control Act of 1985, Pub. L. No. 99-177, 99 Stat. 1037 (1985).

21. See 2 U.S.C. § 644 (2010); see also “Summary of the Byrd Rule,” available at [http://www.rules.house.gov/archives/byrd\\_rule.htm](http://www.rules.house.gov/archives/byrd_rule.htm) (last visited Oct. 12, 2010) (citing 2 U.S.C. § 644).

22. See Statutory Pay-As-You-Go Act of 2010, Pub. L. No. 111-139, 124 Stat. 8 (2010).



by the AMT is sufficiently strong that annually policymakers must struggle with raising taxes in some part of the system in order to offset reducing the AMT's inflation tax yield. The challenge today is how to most wisely generate the revenue necessary to offset the politically pernicious effect of the unindexed AMT.

Even if there were no annual AMT problem, the reduced inflation tax yield from the post-1980 indexing of the Code interacts with the post-1980 growth of budget rules that routinely would require that tax changes estimated to reduce Federal revenues be offset by other tax changes that were estimated to increase Federal revenue. Under the so-called PayGo rules, it is more generally the case that an increase in spending or a reduction in taxes must be offset by a reduction in other spending or an increase in other taxes. This was not a formal constraint that policymakers faced in Dr. Woodworth's time. The current statutory PayGo requirement may have the effect of creating more instances in the future of legislation by topic or tax legislation by crisis. If, hypothetically, the Congress wants to increase outlays for program X or emergency Y, the Congress may turn to the tax writing committees and say, "Come up with a tax change to provide M billion dollars." As I suggested earlier, the challenge for tax policymakers is in keeping the big, cohesive picture in their heads as they move from topic to topic.

As I have talked through my list of changes in legislative process from Dr. Woodworth's day to the present, you may think that the conclusion is, "It was easier back then." I have not reached that conclusion. It was different. The process challenges were different. While I have noted that legislation by topic subject to a PayGo without the inflation tax may make it more difficult to make for comprehensive and consistent reform, perhaps our fiscal crisis will force a tough vote on a revenue raiser that improves economic efficiency and promotes equity. (In keeping with the Joint Committee on Taxation's nonpartisan role, I choose here *not* to offer up some favorite reformer's example.) And perhaps if these tough votes happen one at a time as part of legislation by topic or legislation by crisis, tax policymakers will slowly walk to a comprehensively reviewed and revised Internal Revenue Code. The fundamental challenge for policymakers remains: to create a revenue system that balances the inherent tradeoffs between the competing policy goals of efficiency, equity, and simplicity.

I close as I opened, thanking you for the honor you have presented to me tonight in presenting these remarks. I hope you have found some value in my brief review of the changes in the process of tax legislation from Dr. Woodworth's time to the present and have a sense of the challenges facing tax policymakers. Of course, if the policymakers decide that they intend to

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undertake a comprehensive review and reform of the Internal Revenue Code, the staff of the Joint Committee on Taxation stands ready to assist them, just as it did in Dr. Woodworth's time.