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THE WALL STREET JOURNAL.

The Wall Street Journal

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HEADLINE: Congress Passes the Buck -- Your Tax Buck

BYLINE: By David Schoenbrod and Marci Hamilton

BODY:

Americans are about to find an unpleasant surprise on their long-distance phone bills: a new federal tax. New taxes are never popular, but this one is particularly galling because it flies in the face of the principle that sparked the Boston Tea Party: No taxation without representation. For the new tax is being imposed by fiat from the Federal Communications Commission.

Under the Constitution, only Congress has the authority to levy taxes. Indeed, the Framers went so far as to require that tax bills begin in the House of Representatives, since senators served by appointment in the early days of the nation. With the people's elected representatives directly responsible for the taxes, taxpayers know exactly whom to hold accountable.

But members of Congress have hit on a way of shirking their constitutional duty and spending other people's money without taking responsibility: They tell unelected officials to impose the tax. The new phone tax is a case in point. The Telecommunications Act of 1996 uses the most veiled of language to authorize the FCC to tax: "Every telecommunications carrier that provides interstate telecommunications services shall contribute, on an equitable and nondiscriminatory basis, to the specific, predictable, and sufficient mechanisms established by the {Federal Communications} Commission to preserve and advance universal service."

This language represents a complete delegation of taxing power from Congress to the FCC. Members of Congress now pathetically claim that they never expected the FCC to impose such a whopping tax. But it was they who gave the FCC the power to tax without limit. Congress is trying to take the money, but not the blame.

This is not the only case of Congress delegating the taxing power. Patent filing fees, for instance, far exceed the requirements of the Patent and Trademark Office. Congress and the president have helped themselves to the surpluses generated by such fees, using them to pay for unrelated programs like legal aid and welfare.

Rep. George Gekas (R., Pa.) plans to introduce a bill next week that would stop any tax levied by an administrative agency from going into effect unless Congress enacts it the old-fashioned way -- the constitutional way. Agencies could propose taxes, but Congress would have to take responsibility by enacting them before we have to pay.

If the Constitution mandates that Congress imposes taxes, why is such a bill necessary? The Supreme Court must share the blame. Until the 1920s, the court consistently made it clear that Congress could not delegate its legislative powers to the executive branch. But since then, the justices have let Congress authorize bureaucrats to impose laws through agency regulation and have even signaled that Congress might be able to delegate the power to tax.

There is hope, however, that the court may be returning to constitutional first principles. In the 1996 case of *Loving v. U.S.*, the justices, citing Article I, Section 1 of the Constitution, declared that "the lawmaking function belongs to Congress . . . and may not be conveyed to another branch or entity."

Whether this portends a firmer line on delegation may quickly become apparent. The court will soon hand down its opinion on the constitutional challenge to the Line Item Veto Act. That statute delegates to the president another one of Congress's core powers -- the power to decide the composition of the federal budget -- as well as the taxing power by permitting the president to choose to negate particular aspects of enacted statutes.

The court should make clear that taxation without representation is unconstitutional. And Congress too has a duty to uphold the Constitution. A repeal of the FCC tax, an end to stealth taxation through the Patent Office and the passage of the Gekas bill would be a fitting way of celebrating the Fourth of July.

Mr. Schoenbrod is a professor at New York Law School. Ms. Hamilton is a professor at Benjamin N. Cardozo School of Law. A related editorial appears nearby.

(See related letter: "Letters to the Editor: Congress, Not Agencies Has Power to Tax" -- WSJ June 29, 1998)

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