# POINT & HISTORICAL POINT:
## THE TAX PROTEST MOVEMENT: PAST, PRESENT, AND FUTURE

The tax protest movement in the United States is quite old, but unlike some of us mortals, it is neither infirm nor forgetful. Like Dick Clark on New Year's eve, it shows no signs of slowing and may well outlive us all. In August 2003, the movement arguably received a boost when Vernice Kuglin, a FedEx pilot who had tangled with the Service in Tax Court with respect to her 1994 and 1995 tax liability (*Kuglin v. Commissioner*, T.C. Memo 2002–51), was acquitted of six counts of tax evasion for the years 1996–2001 by a Tennessee jury. The jury found that Ms. Kuglin did not believe she had an obligation to pay taxes. Although Government officials have stated that the case does not mark a pro-protester change in the law, the outcome of the case nevertheless raises important issues both about the current state of the tax protest movement and about the impact of the movement on the collective will of the citizenry to fulfill its tax obligations.

This variation on the more typical Point/Counterpoint addresses those two issues. First, Richard Schmalbeck draws on his thorough analysis of the trial transcript and other court documents to explain how the *Kuglin* result came to be and to draw some lessons for the future of such litigation. Marjorie Kornhauser then puts anti-tax rhetoric and the tax protest movement itself in historical and political perspective, explaining its roots in the right of revolution and examining the functions that it can serve within the tax system. Together, these two scholars unconnected personally with either side of the controversy enhance our understanding not only of *Kuglin* but also of the role of tax protesters in the system and the challenges they pose. —*Ed.*

### VERNICE KUGLIN AND VOLUNTARY COMPLIANCE: NOT THIS YEAR, THANKS

*by Richard L. Schmalbeck, Durham, NC*

My greatest fear in writing about the *Kuglin* case is that I may inadvertently give aid and comfort to the enemy. *Kuglin*, in which a taxpayer—or, more accurately, a non-taxpayer—was acquitted of tax evasion by a jury in the Western District of Tennessee in August 2003, was a major victory for the tax protester movement. Since that movement is famously selective in its choice of authorities, even an occasional victory of this magnitude is enough, one fears, to launch a thousand imitators. The last thing I want to do is to clarify the template for those imitators to follow, or to seem to offer approval of the outcome in *Kuglin* itself.

So, if the tax protesters in the room would excuse themselves? Thank you. For the rest of us, the facts: The non-taxpayer, Vernice Kuglin, was for a number of years (and probably still is) a pilot for Federal Express, and was based at their headquarters in Memphis, Tennessee. She is the daughter of missionaries, a single parent of slightly above-average education (three years of college) and significantly above-average income (ranging from $168,000 to $191,000 in the tax years involved in her case). About a decade ago, after an extensive study of the tax law, she concluded that she probably didn't have to pay federal income taxes if she chose not to. At a couple of points, she asked the Service whether it believed she was compelled to pay taxes, and, if so, by what authority. Telephone contacts with the Service were, to her mind, unhelpful; and as to her written queries, the Service behaved rather like God in an existentialist play, maintaining a stony silence in the face of her repeated entreaties.

In response, beginning in 1993, and continuing through 2001, Ms. Kuglin intentionally did not file income tax returns. She did file W–4 forms, for purposes of determining her wage withholding obligations, which claimed either ten personal exemptions (despite having only one dependent child), or total exemption from withholding on grounds that she was exempt from the income tax itself. Eventually, she was indicted for tax evasion for the years 1996 through 2001, inclusive. She was not prosecuted for the first three years for which she hadn't filed, presumably because those earlier years were, by the time the indictment was issued, closed by the statute of limitations. (This may have been significant, since it would seem to have been easier to prove knowing falsehood as to the claim for ten exemptions than for the claim of total exemption; but the former claim was only made in the earlier years.)

Her defense conceded many of the government's allegations, but denied that any shortcomings were willful. The key evidence was her own lengthy testimony, during which she recounted her passage from willing taxpaying to conscious refusal. The first step in her transformation was based on her reflections on the meaning of "voluntary compliance." As she put it: "[T]hey [antecedent unclear] said it was voluntary compliance. Now the words voluntary and compliance to me don't match very well. Voluntary . . . was something that wasn't mandatory . . . [but] compliance was completely different. It was something you had to do. So I was confused by this term." (Trial Record, vol. II, at 202.)

When her questions to the Service went unanswered, she studied the tax law herself. And she learned, at least by the time of her trial, quite a lot. Her testimony was a *tour de force* of contem-

porary tax protester arguments, including ones based on the Service's alleged failure to comply with provisions of the Privacy Act of 1974 and the Paperwork Reduction Act of 1980, and arguments to the effect that withholding is only required as to payments to nonresident aliens, among several others. But the central argument with respect to her determination that she did not owe any income tax was based on her close examination of several tax opinions, which she summarized as follows:

> From the Constitution, I learned that there were two forms of taxes, direct taxes and indirect taxes. . . . Pollock [157 U.S. 429, 158 U.S. 601 (1895), in the dissenting opinion of Justice White] identified income taxes as . . . indirect taxes. . . . Brushaber [240 U.S. 1 (1916)], . . . reconfirmed this. Flint versus Stone Tracy [220 U.S. 107 (1911)] had defined for me what an [indirect] tax was, and I realized that my occupation did not fall under the categories [subject to such taxes] of manufacturing, corporations or licenses. Jack Cole versus McFarland (*sic*) [*Jack Cole Co. v. MacFarland*, 206 Tenn. 694, 337 S.S. 2d 453 (Tenn. Sup. Ct. 1960)] was the clincher [; it said that] I had a right to earn a living . . . and that right cannot be taxed, and that really was the final . . . piece of the puzzle. . . .[Trial Record, vol. II, at 238.]

This argument, of course, as well as all the others she offered, is full of mistakes. She doesn't appear to understand, for example, what to make of statements contained in dissenting opinions, or in state tax law opinions. But while the arguments to the effect that she owed no tax were specious, the argument that she could have *believed* that she owed no tax was not. And, of course, in a tax evasion prosecution, her beliefs were critical. Throughout her testimony, Ms. Kuglin presented herself convincingly as someone who had made diligent efforts to determine her responsibilities, before concluding that they *probably* did not include paying income taxes. (The absence of certitude in her testimony seems to have enhanced its credibility; the sense of her presentation wasn't that she was sure that she was right, but rather that she truly thought she might be.) One is reminded in her testimony of a fundamental tenet of the Protestant Reformation: the notion of the priesthood of all believers. As slightly transformed to this context, the view of the defendant seemed to be that she should be able, if she put her mind to it, to form her own interpretations of the relevant legal materials; and that, furthermore, her interpretations were entitled to as much weight as any expert's (or any court's, for that matter).

One might have hoped that the cross-examination would have shaken some of Ms. Kuglin's representations about her state of mind. One suspects that much of her defense was manufactured for the trial, rather than having been formulated by the time she decided to cease compliance; closer attention to what she knew, and when she knew it, might have revealed more about her state of mind at the times of the alleged acts of evasion. But the cross was largely ineffective. The Assistant U.S. Attorney trying the case does not appear to have been a tax specialist, and generally seemed less familiar with the legal materials in question than the defendant herself, who occasionally offered gentle corrections on items like the dates of important tax cases. (*See, e.g.*, Trial Record, vol. III, at 86 (*Brushaber* decided in 1913, not 1896).)

The jury did not find this an easy case, reporting to the judge after about four hours of deliberations that the members of the jury did not think that they would be able to reach a verdict. But after further deliberation the following morning, the jury acquitted Ms. Kuglin. Sporadic quotes from jurors appeared in some press accounts, but not in sufficient detail to form a clear view of their collective evaluation of the evidence. But it would be quite wrong to think of this as an instance of jury nullification. The defendant's testimony was convincing enough to explain the outcome without resort to any untoward assumptions about the jury's predisposition.

As disturbing as the outcome of this case is, I think that there is reason to believe that it may be a bit less dangerous than it at first appears. The character and personal qualities of the defendant contributed greatly to her success; those will not be easily replicated by any large number of taxpayers. She managed to display high degrees of both intelligence and naivete, which made it possible for her to weave a narrative of her road to noncompliance with enough superficial coherence to convince the jury that a relatively unsophisticated person (as she appeared to be, despite her intelligence) might actually have believed it.

What are the lessons that the Service and Justice Department might learn from this case? Most are obvious, and I imagine ones that the Government has already noted. First, the phrase "voluntary compliance" should be forever banned from the lexicon of the taxing authorities. It clarifies nothing, and sows predictable confusion. Second, the Service should answer its mail, if only with a stock letter assuring protesters that they are indeed obligated to file returns and pay their taxes. Third, because the Government cannot afford to lose very many cases like this, the Justice Department should allocate ample resources from the criminal section of the Tax Division for these prosecutions. Finally, and most importantly, the Government should be more selective in deciding whom to prosecute for tax evasion; in particular, unless it is reasonably certain that it can show that the potential defendant could not plausibly have entertained doubt about her responsibilities to declare and pay taxes, it should move slowly, perhaps initiating civil actions to collect tax and penalties first, and pursuing criminal penalties only if resistance persists in tax years after ample notice to the taxpayer can be demonstrated.

Does this last suggestion amount to giving a taxpayer something of a "one free bite" rule as to tax compliance? Perhaps. But civil penalties can still present a significant deterrent. And an approach of the sort suggested simply responds to a reality that the Govern-

ment has to face: the tax protest movement is sufficiently well-established at this point that it is actually not implausible that taxpayers in some circumstances could, in some semblance of good faith, form the view that they owe no tax. Whether that was true in Ms. Kuglin's case or not, I do not know; but I can say that, on the basis of the record, a jury could, and apparently did, decide that it could not say beyond a reasonable doubt that she had violated a known legal duty.

## ANTI-TAX RHETORIC – TINDERBOX OR SAFETY VALVE?

*by Marjorie E. Kornhauser, New Orleans, LA*

The power to tax, the Supreme Court once said, "is not only the power to destroy, but it is also the power to keep alive." *Nicol v. Ames*, 173 U.S. 509, 515 (1898). For over 100 years Americans have remembered and repeated the first half of the sentence and forgotten the second. This selective amnesia is especially striking since the point of the Court's pronouncement was to emphasize that the taxing power "is the one great power upon which the whole national fabric is based . . . as necessary to the existence and prosperity of a nation as is the air he breathes to the natural man." *Id.* America's national amnesia about the positive aspect of taxation is rooted in a distrust of government so deep-seated that some commentators view it as the defining element of the American personality.

Anti-tax sentiment is such a major component of this distrust that to be anti-tax in the United States is to be patriotic. Even within mainstream discourse, anti-tax rhetoric is replete with revolutionary and nationalistic allusions. Candidates for the 2000 Republican presidential nomination, for example, called taxation slavery (Alan Keyes) and a breeding ground for tyranny (Lamar Alexander). Former President Ronald Reagan called the pre-1986 tax system "un-American." In the late 1990s then House Ways & Means Chair Richard Armey (R–TX) and Representative Billy Tauzin (R–LA) referred directly to one of the nation's founding symbols by re-enacting the Boston Tea Party, but this time dumping the Internal Revenue Code into the Boston harbor. By invoking such defining historical events as the Revolutionary War (the ultimate protest against tax), this type of anti-tax rhetoric wraps opposition to tax in the American flag and ties it to core American principles of freedom and liberty.

Such rhetoric can be dangerous. Although users of this rhetoric may simply wish to reduce taxation, their language risks increasing opposition to taxation itself. Since taxation is fundamental to any nation's existence, undermining the legitimacy of taxation undermines a citizenry's willingness to pay tax that, in turn, can threaten the stability of its government. This is especially true in a nation where tax protests have historically served as a focal point for heated political battles about the nature and extent of government—battles that, on occasion, have been literally violent, not just figuratively so. Tax-centric revolts have occurred at critical junctures in America's history. The original Revolution that gave birth to the country is the most prominent, but there are also Shays' Rebellion, which some commentators view as instrumental to the signing of the Constitution, and the Whiskey Rebellion that tested that new constitution. In each instance, the protesters not only viewed taxation as a tyrannical exercise of governmental power, but also saw physical force as a legitimate method of fighting for liberty—the right of revolution being the ultimate tool in the arsenal in the battle for freedom.

The right arises from the compact theory of government. If government exists because the people have agreed to it, then the people have the right to resist illegal, oppressive government actions, and resist forcibly if necessary. Although the right of revolution was necessary in founding the nation, it is less functional – even dysfunctional – in maintaining the nation. Consequently, shortly after the Revolution, many people thought that the right to forcible resistance should end once a legitimate government was in place. Indeed, many people believed that the suppression of the Whiskey Rebellion effectively terminated the right to use force to resist unjust laws.

History shows they were wrong. Just a few years after the Whiskey Rebellion, another armed tax rebellion, the Fries Rebellion, resulted in one of the leaders being convicted of treason, although President Adams eventually pardoned him. In 1832, South Carolina nullified the 1832 protectionist tariff as a tyrannical, illegal act of the government and threatened to secede if federal agents attempted to collect. A military response by President Jackson was narrowly averted by the passage of a compromise tariff.

Even today, the right of revolution has only been domesticated, not eliminated. As with anti-tax sentiment, belief in this right exists in the mainstream as well as on the fringe. Respectable advocates of individuals' right to bear arms ground their second amendment claim in the right of revolution. A few state constitutions, such as New Hampshire's, explicitly recognize the right of revolution: "whenever the ends of government are perverted, and public liberty manifestly endangered, and all other means of redress are ineffectual, the people may, and of right ought to reform the old, or establish a new government. The doctrine of nonresistance against arbitrary power, and oppression, is absurd, slavish, and destructive of the good and happiness of mankind." (Art. 10) In the wake of fierce and destructive riots, the 1969 Task Force on Violence recognized that needed change in the United States often occurs only through violence, and stated "[i]f the Boston Tea party is viewed historically as a legitimate method of producing such change, then present-day militancy . . . can claim a similar legitimacy." Price M. Cobbs & William H. Grier, *Foreword*, in TASK FORCE ON VIOLENT ASPECTS OF PROTEST AND CONFRONTATION OF THE NATIONAL COMMISSION ON THE CAUSES AND