The original documents are located in Box 8, folder "Congressional - Tax Liability" of the Philip Buchen Files at the Gerald R. Ford Presidential Library.

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THE WHITE HOUSE

WASHINGTON

July 23, 1976

MEMORANDUM FOR: JACK MARSH
JIM LYNN
MAX FRIEDERSDORF

FROM: PHILIP BUCHEN P.

SUBJECT: Federal Legislation to Relieve Members of Congress From Paying Maryland Income Tax

Bob Griffin called and asked that we look carefully at this legislation before formulating our position. He indicates that Congressmen who have their second homes either in the District of Columbia or in Virginia are exempted from the District or state income taxes. Moreover, he refers to the Senate Judiciary Committee report on this legislation which makes a case that it is unconstitutional for Maryland to tax the incomes of Congressmen who are also subject on the same income to taxation by the states of their permanent residence.

cc: Ken Lazarus

July 26, 1976

To: Ken Lazarus

From: Eva

Mr. Buchen asked if you would follow through on this.

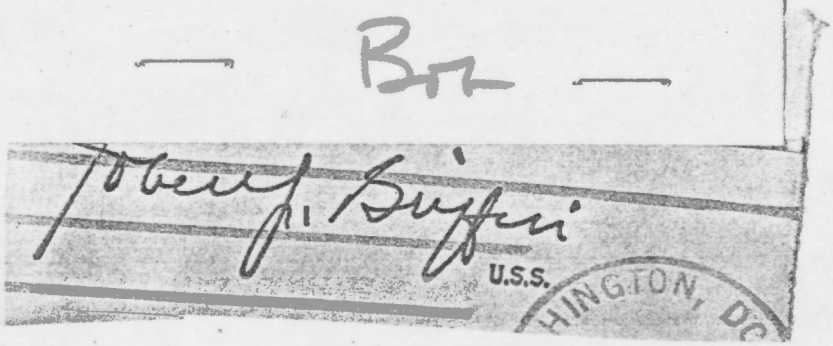
Also attached is a copy of a memo we had previously sent you on the subject (7/23).

Phil —

If there is any thought of a veto on this, please call me first.

The "Constitutional Considerations" argument beg. on p. 3 is very strong I think.

— Bob —



Calendar No. 604

94TH CONGRESS
2d Session

SENATE

REPORT
No. 94-631

CONGRESSIONAL TAX LIABILITY

FEBRUARY 6, 1976.—Ordered to be printed

Mr. HRUSKA, from the Committee on the Judiciary, submitted the following

REPORT

[To accompany S. 2447]

The Committee on the Judiciary to which was referred the bill (S. 2447), to amend title 4 of the United States Code to make it clear that Members of Congress may not, for the purposes of State income tax laws, be treated as residents of any State other than the State from which they were elected, having considered the same, reports favorably thereon and recommends that the bill do pass.

STATEMENT

HISTORY OF THE LEGISLATION

The bill was introduced on October 2, 1975. A similar bill, H.R. 8904, was introduced in the House on June 24, 1975.

NATURE AND SCOPE OF THE LEGISLATION

The founding fathers, in order to insure that the people were properly represented, Constitutionally required that members of Congress be inhabitants of the state from whence they are elected. Because of this Constitutional provision most members of Congress, unlike other individuals, are legally required to maintain a residence in their home state while at the same time, in view of geographic considerations, find it necessary to establish an abode in or near Washington, D.C.

The purpose of the legisltion is to provide for equal state income tax treatment for those Congressmen who are subject to state income tax assessment in their elective state or congressional district and in the place of their Capitol abode.

57-010

Members of Congress who for reasons of distance are required to maintain their abode near the United States Capitol in order to discharge their duties normally do so in the states of Virginia and Maryland or in the District of Columbia.

The District and the Commonwealth of Virginia both expressly exempt members of the Congress under their income tax statutes. D.C. Code § 47–551 (C) (S), Virginia Code. Sec. 58–151.02(e)(1)(i).

No similar exemption is provided by the State of Maryland.

The Maryland Code provides for an income tax on substantially all the income of "residents" of Maryland. A resident is defined as "an individual domiciled in this State on the last day of the taxable year, and every other individual, who, for more than six months of the taxable year, maintained a place of abode within this State, whether domiciled in this State or not; but any individual, who, on or before the last day of the taxable year, changes his place of abode to a place without this State, with the bona fide intention of continuing to abide permanently without this State, shall be taxable as a resident of this State for the portion of the taxable year in which he resided in this State, and as a nonresident of the State for the remainder of the taxable year. The fact that a person who has changed his place of abode within six months from so doing again resides in this State, shall be prima facie evidence that he did not intend to have his place of abode permanently without this State." Md. Ann. Code, Art. 81, Sec. 279(i).

Only limited tax credits are available to Maryland residents who are entitled to a credit against Maryland tax for tax paid to other states on the income taxable by Maryland. Md. Ann. Code, Art. 81 Sec. 290. Maryland also collects income taxes on behalf of its counties as an add-on percentage of the state income tax. No credit toward this tax is allowed for taxes paid to another state. (See Senate Bill No. 23, Chapter 3, Laws 1975, approved February 11, 1975 amending Article 81, Section 290 of the annotated Code of Maryland.)

The action of the State of Maryland taxing members of Congress from other states who maintain an abode in Maryland for the purposes of being near the U.S. Capitol raises serious Constitutional questions.

1. No State can tax an instrumentality of the United States Government. *McCulloch v. Maryland*, 4 Wheat. 316 (1819). Congressmen being the embodiment of the Legislative Branch of government are such an instrumentality and immune from taxation by a state.

2. The Constitution provides that each Senator and each Representative must be an inhabitant of the state he represents when elected. Art. I Secs. 2, 3. Inhabitant and resident are synonymous. This provision implies that the member shall cotninue to be an inhabitant to preserve his right to stand for reelection. The ability of any other state to determine that a member is a resident for any purpose infringes on the Constitutional requirement and right of reelection.

3. Multiple taxation of Senator and Representatives by several jurisdictions, based simply on the fact of physical location necessary to the performance of constitutional duties, violates the due process and equal protection clauses of the fourteenth amendment.

Approximately twenty-five Senators and one hundred Representatives maintain abodes in Maryland. The bill will insure that these Constitutional principles are abided with and prevent needless litigation.

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Constitutional Considerations

State Taxation of Instrumentalities of the Federal Government

A research of this subject reveals no previous attempt of a state to tax the income of members of Congress because of their physical location incident to service in Congress. Therefore, no direct decisions exist on the question of immunity of Senators or Representatives from income tax of states other than the state that they represent. However, since the time of the inception of the Republic, when Maryland attempted to tax the Federally-created Bank of the United States, it has been established that no state can tax an agency or instrumentality of the United States Government. McCulloch v. Maryland, *supra*.

An agency or instrumentality of the United States Government has, for this purpose, been broadly construed to include not only the departments and regulatory commissions of the Government, but also public corporations such as the Federal Land Bank (see *Federal Land Bank* v. *Bismark Lumber Co.*, 314 U.S. 95 (1941)) and the Home Owners Loan Corporation (see *Pittman* v. *Home Owners Loan Corp.*, 308 U.S. 21 (1939)). The states may only tax properties, functions, and instrumentalities of the Federal Government with the express consent of Congress. *Kern-Limerick Inc.* v. *Scurlock*, 347 U.S. 110 (1954); *Reconstruction Finance Corporation* v. *Beaver County*, 328 U.S. 204 (1946).

Until relatively recently, the courts had held that the states cannot levy a tax upon the income of Federal employees because to do so was indirectly a tax by the states on the Federal Government. See *Dobbins* v. *Commissioners of Erie County*, 16 Pet. 435 (1842); *New York ex rel Rogers* v. *Graves*, 299 U.S. 401 (1937). Conversely, the Federal Government could not tax state officials. See *Collector* v. *Day*, 11 Wall. 113 (1870).

In 1938, the Supreme Court decided the case of *Helvering* v. *Gerhardt*, 304 U.S. 405, holding that the Federal Government could tax a state employee, specifically an employee of the Port of New York Authority, even though the Authority itself was not subject to taxation.

In the case of *Graves* v. *New York*, 306 U.S. 466 (1939), the Supreme Court considered again whether a state could impose an income tax upon a Federal employee, in this case, an employee of the Home Owners Loan Corporation. The Supreme Court held that the corporation itself was immune from state taxation, but that the income of an employee was personal and a tax on such income did not impose a burden on the agency. The Court made it clear that no state could tax the agency itself. "[W]hen the National Government lawfully acts through a corporation which it owns and controls, those activities are governmental functions entitled to whatever tax immunity attaches to those functions when carried on by the Government itself through its departments." 306 U.S. at 477. The Court strongly implied that if Congress chose to exempt the incomes of Federal agency employees from state income taxation, the exemption would be effective. See 306 U.S. at 479, 480. In the *Graves* case, however, the Court found that there was no basis for inferring an intention of Congress to exempt the income of employees of the corporation. See 306 U.S. at 485.

The case of a Federal employee is totally different in essence from the situation of a member of Congress. A Federal employee is not constitutionally forced to maintain an abode away from his home state; he may readily become a citizen of the state where he is employed. His employment is not necessarily temporary or uncertain; he has not been chosen to represent citizens as their representative, but is pursuing a personal career. As an employee, he is not an agency of the Government. His employment is not basic to the maintenance of the Government. *Helvering* v. *Gerhardt*, 304 U.S. 405, 418, 424 (1938).

On the other hand, a member of Congress is not engaged merely in the pursuit of his personal career. Being a member of Congress, he is on more and no less than a representative of his constituents. He may run for office, but must be elected by the people. In this basic sense, he cannot select the occupation of Senator or Representative.

Moreover, Congress is not merely a Federal agency or instrumentality; it is a fundamental branch of the Federal Government created by the Constitution directly. Article I of the Constitution provides that all legislative powers of the Federal Government shall be vested in the Congress, consisting of the Senate and House of Representatives. It further provides that the Senate and House shall be composed of members elected by the people of the several states. The Congress, therefore, is simply an aggregation of its members. A tax on the incomes of the Senators and Representatives is a tax on the Congress, as a tax on the income of the Bank of the United States, or the powers or functions of such a bank, would be a tax on a Federal Government agency.

Members of Congress are not Federal employees, and the decision in the *Graves* case, *supra*, allowing a state to tax the salary of an employee of the Home Owners Loan Corporation is not applicable. Under the Public Salary Tax Act of 1939, as amended in 1966, Congress consented to non-discriminatory taxation of the compensation of a Federal "officer" or "employee" by duly constituted taxing authorities "having jurisdiction." 4 U.S.C. Sec. 111.

The terms "officer" and "employee" are not defined for the purposes of the Public Salary Tax Act and there is nothing in that Act to indicate a consent to state taxation of members of Congress. In fact, the terms "officer" and "employee" are not usually defined to include members of Congress. See, *e.g.*, 5 U.S.C. Secs. 2104, 2105, and 2106 (providing for different definitions of "officer," "employee," and "Member of Congress" for the purposes of Title 5 of the United States Code).

The conclusion, therefore, is that a tax on a Congressman by a state, based on his compensation for serving in the Congress, is a tax on the legislative branch of the Federal Government—which no state may impose.

Exemption because the Maryland Definition of "Resident" Is Here Invalid

The Constitution provides that a Representative or a Senator must "when elected, be an inhabitant of that state in which he shall be chosen." Art. I, Secs. 2, 3. Although literally these provisions do not require that a Senator or Representative continue to be an inhabitant

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of the State that he represents *after* his election, there is no question in practice, usage, and construction that Senators and Representatives are deemed to continue to be inhabitants of their respective states during their terms of office. Otherwise, no member of Congress could ever be re-elected, except from the states of Virginia and Maryland. That is, if a Senator from Alaska, who lives in the State of Maryland during his term of office, is deemed to be a resident of Maryland rather than an inhabitant of Alaska, he could not run for re-election.[1] Since the Constitution requires each Senator and Representative to be an inhabitant (*i.e.*, resident) of the state that he represents, it is concluded that no definition in any state statute purporting to make him a resident (or inhabitant) of any other state is constitutionally valid.

Since the Constitution prohibits treating Senators and Representatives as residents (or inhabitants) of any state other than the one they represent, it follows that Maryland lacks the legislative jurisdiction to tax the income of Senators and Representatives other than its own. It has long been established that a state has no authority to tax the income of a nonresident derived from sources outside that state.

> Where there is jurisdiction neither as to person nor property, the imposition of a tax would be *ultra vires* and void. If the legislature of a state should enact that the citizens or property of another state or county should be taxed in the same manner as the persons and property within its own limits and subject to its own authority, or in any manner whatsoever, such a law would be as much a nullity as if in conflict with the most explicit constitutional inhibition.

St. Louis v. *The Ferry Company*, 11 Wall. 423, 430 (1870), quoted with approval in *Miller Bros. Co.* v. *Maryland*, 347 U.S. 340, 342 (1954); *accord*, *Dewey* v. *Des Moines*, 173 U.S. 193 (1899).

The statutory provisions of Virginia and the District of Columbia are regarded as simple recognitions of the fact that each Senator and Representative is in law a resident of the state which he represents, and not any other state. In a basic sense, the location of any Senator or Representative in the jurisdictions adjacent to the Capitol is a necessary incident to the proper carrying on of constitutional duties. Since Senators or Representatives cannot inhabit the air above the buildings of Congress, they are bound to live in one of the surrounding jurisdictions, be it the District of Columbia, Virginia, or Maryland. Their physical presence in one of these jurisdictions does not make them local "residents" in a constitutional sense, and does not give

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[1] The words "resident" and "inhabitant" are for these purposes synonymous or virtually synonymous. The *Oxford Universal Dictionary* (3d Ed.) defines an "inhabitant" as "a human being . . . dwelling in a place, a permanent resident." A "resident" is defined as "one who resides permanently in a place; sometimes spec. applied to inhabitants." "In its general and popular sense, the word 'inhabitant' is the same as 'resident,' or one who lives in a place." *New Haven* v. *Bridgeport*, 37 A. 307 (Conn. 1897). When employed in statutes, the term "inhabitant" has been held to be equivalent to the word "resident." *E.g.*, *Shaw* v. *Quincy Mining Company*, 145 U.S. 444 (1892); *ARO Manufacturing Co.* v. *Automobile Research Corp.*, 352 F.2d 400 (1st Cir. 1965). In considering qualifications of Congressmen, the former House Committee on Elections defined the term "inhabitant" as it is used in Article I, Sections 2, 3 of the Constitution as follows: "This term is the legal equivalent of the term 'resident' . . . ." *Scott, Hinds' Precedents of the House of Representatives*, Vol. I, Sec. 439, p. 429. See also *Pigott*, *id.*, Vol. I, Sec. 369; *Bailey*, *id.*, Vol. I, Sec. 434.

the state wherein they live authority to tax them on their compensation as Federal legislators.[2]

The view set forth here is directly supported by decisions of the former Committee on Elections of the House of Representatives.

In determining whether persons were inhabitants of the states from which they had been elected, that Committee frequently declared that inhabitancy was the equivalent of residence and that two factors—where did he vote and to what state did he pay taxes—were the important determinants of inhabitancy. See *Updike* v. *Ludlow*, *Cannon's Precedents of the House of Representatives*, Vol. VI. Sec. 55; *Beck*, *id.*, Vol. VI, Sec. 174. To permit Maryland to impose incomes taxes on a non-Maryland Congressman who lives in Maryland in order to attend to his Congressional duties, would be to attach one of the most important indicia of inhabitancy to a state other than the one which he represents. The result could be to bar that Congressman from representing his home state (the representation of which was the very reason for his maintaining living quarters in Maryland). In a case like this, where the provisions of the United States Constitution and a state statute are in conflict, the supremacy clause requires that the state statute give way.

In the *Beck* case, the Committee observed—

> We do not think that the framers of the Constitution intended by the use of the word "inhabitant" that the anomalous situation might ever arise that man should be a citizen, a legal resident, and a voter within a given State and yet be constitutionally an inhabitant elsewhere. If any such conclusion could be reached we might have the peculiar result in this country of a man being a resident, a citizen, and a voter in a given State, and yet within the constitutional sense barred from the right of representing a district in that State in Congress, but having the right to represent a district in another State in Congress. No such interpretation can fairly be read into this provision.

Consistently with this view, a member of Congress from another state does not become an inhabitant or resident of Maryland because he lives there during his term of office, even if Maryland statutes purport to say otherwise.

This view receives further reinforcement from the Soldiers' and Sailors' Civil Relief Act of 1940, which in Section 514 provides that military or naval personnel may not, for purposes of state income taxation, "be deemed . . . to have acquired a residence or domicile in, or to have become resident in or a resident of, any other state, territory, possession, or political subdivision . . . or the District of Columbia" by reason of compliance with military or naval orders. This legislation is binding upon the states (including Maryland).

[2] It should be noted that Senators and Representatives are subject to local property taxes, which are inherently *in rem* taxes. They are also subject to a variety of excise taxes, such as sales taxes on transactions. Thus, there is no question that they lend substantial financial support to the jurisdictions in which they live.

If the states could constitutionally determine "residence" as they pleased for tax purposes, the Soldiers' and Sailors' Civil Relief Act would be invalid as an encroachment by Congress on powers of the states. This is not the case. See *Dameron* v. *Brodhead*, 345 U.S. 322 (1953).

Due Process and Equal Protection

To subject members of Congress to local income taxes because of their abode in a state near the Capitol is to subject them, in most cases, to double taxation as a result of their constitutional fuctions and duties. They are required constitutionally to be and remain citizens of the states they represent, and to be subject to taxes as citizens of their home states. If the Maryland statute were applicable, they would be required additionally to pay taxes to Maryland. In accord with this view, this would deny them due process and equal protection of the laws.

Again, the case of a member of Congress with that of a Federal employee is contrasted. A Federal employee will ordinarily have one domicile and one residence. He will be subject, as a resident or a domiciliary, to income tax in only one state or jurisdiction. Unless the Maryland definition of "resident" is struck down, however, a member of Congress from a state other than Maryland, who lives in Maryland, will automatically be subject to double taxation.

Moreover, this is a classical case of taxation without representation. A Senator from Utah obviously votes in Utah, and cannot vote in Maryland. Although he is not and cannot be a citizen of Maryland, and does ont participate in its government, the Maryland income tax law wrongfully purports to tax him.

In this respect, the situation of a member of Congress is unique, and the uniqueness is a direct result of the constitutional requirements for election. The result, if Maryland's right to tax were upheld, would be grossly discriminatory and unfair.

It may be contended that since Maryland recognizes a credit for taxes paid to other states, most of double taxation is obviated. There are several responses to this fallacious argument. First, to the extent that Maryland taxes are at a higher rate than home state taxes, there is double taxation in the amount of the excess. Second, the recent Maryland statute indicates an intention to allow only a partial credit. Thus, Maryland's top tax bracket is 5%, but county taxes may be an additional 2½%. A Senator or Representative from a state imposing a 10% income tax will pay an aggregate 12½% tax. A Senator or Representative from a home state imposing a 3% tax will pay an aggregate tax of 7½%. A Senator or Representative from a home state imposing a 6% tax will pay an 8½% tax.

Finally, it should be noted that the interstate credit depends on reciprocity, and is, in any event, a matter of grace. As Maryland has recently provided with respect to so-called county taxes, the credit can be partially or wholly eliminated, leading to complete double taxation.

The unfair character of a Maryland tax on out-of-state Congressmen may be illustrated with respect to specific transactions. A Representative from Montana owns a ranch in Montana which he sells at a capital gain of $50,000. Although Maryland has nothing whatever to do with this transaction, if the Representative maintains premises in Maryland, the State will presumably attempt to tax the Montana gain in its entirety. Yet, the transaction has no Maryland connection in any meaningful sense.

Finally, while the problem we are considering is relatively discrete at the present time because Maryland income taxes are fairly low, nothing prevents the State from increasing its rate to as high a range as it pleases. Under circumstances of very high rates, double taxation of members of Congress could lead to making Congressional positions untenable for persons of limited means. In this sense, a free-handed power to impose double taxes is indeed, as Chief Justice Marshall observed in the *McCulloch* case, the "power to destroy." What would be destroyed, of course, would be the equal opportunity for persons of limited means, as well as those of great means, to become members of Congress. The "door of this part of the federal government" heretofore "open to merit of every description . . . without regard to poverty or wealth" would be closed. *The Federalist*, No. 52; *cf. Bullock* v. *Carter*, 405 U.S. 134 (1972) (forbidding large filing fees from barring candidates for public office); *Williams* v. *Rhodes*, 393 U.S. 23 (1968).

Explanation of the Legislation

The bill provides that no state or political subdivision thereof in which a member of Congress maintains a place of abode for purposes of attending sessions of Congress may for state or subdivision income tax purposes treat the member as a resident or domiciliary or treat any income paid by the United States as income for services performed within or from sources within such State or political subdivision thereof unless such member represents such State or a district of such State.

The bill also provides equal treatment for delegates from the District of Columbia, Guam and the Virgin Islands and the Resident Commissioner from Puerto Rico. The District of Columbia is included within the prohibitions of the amendment. It is the intention of the Committee that the bill shall apply to any past accrued tax liabilities of the nature encompassed within this legislation not yet paid the State or political subdivision.

Cost of Legislation

In compliance with Sec. 252(a)(1) of the Legislative Reorganization Act of 1970, as amended (2 U.S.C. 190j), the Committee estimates that there will be no cost to the Federal government in carrying out the provisions of this legislation.

Section-by-Section Summary

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Union Calendar No. 664

94TH CONGRESS
2D SESSION

S. 2447

[Report No. 94–1271]

IN THE HOUSE OF REPRESENTATIVES

FEBRUARY 19, 1976

Referred to the Committee on the Judiciary

JUNE 16, 1976

Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

AN ACT

To amend title 4 of the United States Code to make it clear that Members of Congress may not, for purposes of State income tax laws, be treated as residents of any State other than the State from which they were elected.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That (a) chapter 4 of title 4 of the United States Code is amended by adding at the end thereof the following new section:

"§ 113. Residence of Members of Congress for State income tax laws

"(a) No State, or political subdivision thereof, in which a Member of Congress maintains a place of abode for purposes of attending sessions of Congress may, for purposes of

any income tax (as defined in section 110(c) of this title) levied by such State or political subdivision thereof—

"(1) treat such Member as a resident or domiciliary of such State or political subdivision thereof; or

"(2) treat any compensation paid by the United States to such Member as income for services performed within, or from sources within, such State or political subdivision thereof,

unless such Member represents such State or a district in such State.

"(b) For purposes of subsection (a)—

"(1) the term 'Member of Congress' includes the delegates from the District of Columbia, Guam, and the Virgin Islands, and the Resident Commissioner from Puerto Rico; and

"(2) the term 'State' includes the District of Columbia.".

(b) The table of sections for such chapter 4 is amended by adding at the end thereof the following new item:

"113. Residence of Members of Congress for State income tax laws."

Passed the Senate February 18, 1976.

Attest: FRANCIS R. VALEO,

Secretary.

THE WHITE HOUSE

WASHINGTON

July 23, 1976

MEMORANDUM FOR: JACK MARSH
JIM LYNN
MAX FRIEDERSDORF

FROM: PHILIP BUCHEN

SUBJECT: Federal Legislation to Relieve Members of Congress From Paying Maryland Income Tax

Bob Griffin called and asked that we look carefully at this legislation before formulating our position. He indicates that Congressmen who have their second homes either in the District of Columbia or in Virginia are exempted from the District or state income taxes. Moreover, he refers to the Senate Judiciary Committee report on this legislation which makes a case that it is unconstitutional for Maryland to tax the incomes of Congressmen who are also subject on the same income to taxation by the states of their permanent residence.

cc: Ken Lazarus

THE WHITE HOUSE

WASHINGTON

July 30, 1976

MEMORANDUM FOR: JIM CANNON

THROUGH: PHIL BUCHEN

FROM: KEN LAZARUS

SUBJECT: Enrolled Bill S. 2447 - Exemption of Members of Congress from State Income Taxes

Counsel's Office has reviewed the attached OMB memorandum on the subject bill and offers the following:

(1) Constitutional Considerations. The arguments advanced by proponents of S. 2447 to the effect that it is constitutionally required are simply without merit.

(a) Congressmen and Senators do not qualify as "instrumentalities of the United States", beyond the reach of Maryland taxes. The folly of this position should be recognized by the fact that this argument would also lead one to the conclusion that Members of Congress cannot be subjected to any taxes imposed by the states which they represent.

(b) Similarly, we do not believe that the Maryland income tax scheme exposes Senators and Congressmen living there to multiple taxation in contravention of the Fourteenth Amendment. Part-time residency alone has long been considered a sufficient nexus for state taxation and the fact that Maryland recognizes a credit for taxes paid to other states on a reciprocal basis generally eliminates the dual state taxation problem.

(c) Maryland imposes a maximum 5 percent state tax on income and also authorizes a 50 percent surcharge imposable at the county level, for an effective tax rate of 7.5 percent. It is true that the county surcharge does not permit any credit for other state taxes, but this feature is only a relatively minor aspect of the bill and would not appear to raise an issue of constitutional dimension.

(2) Equities.

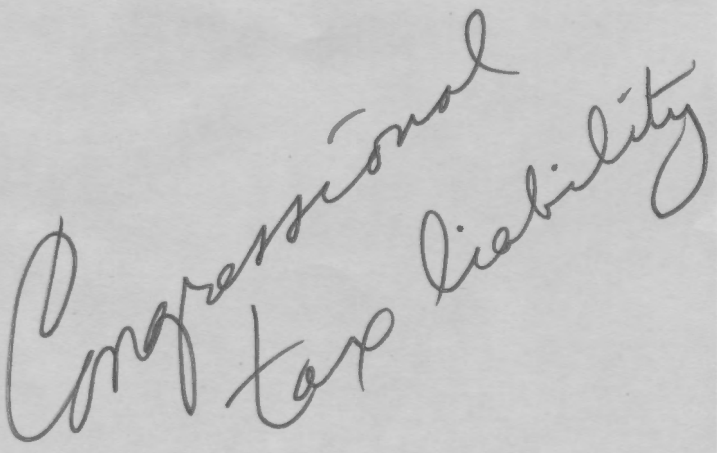
(a) Congressmen and Senators who live in Maryland while representing other states are at a disadvantage over those from other states who live in the District of Columbia or in Virginia. The District and Virginia exempt them from its income tax but also exempt the President and Vice President and appointees of the President who are confirmed by the Senate if they are residents of another state. On the other hand, Congressmen and Senators subject to the Maryland income tax are allowed a credit against the state portion of Maryland tax for income taxes paid to their home states but not against the county portion. This credit does not, however, help those whose home states impose no income tax, and those whose home states tax at a lower rate will have to make up the difference to Maryland.

(b) The sponsors of the bill have not argued that out-of-state Members of Congress should likewise be exempt from state and local property taxes on their homes in or near Washington. So Maryland residents can argue that income taxes are just another form of tax to support the schools and other services from which out-of-state Members of Congress benefit and it is sufficient equity to allow them a credit against the state portion of the Maryland income tax for income taxes paid to their home states.

(3) Federalism. It is, of course, difficult to perceive a Federal interest in these circumstances sufficient to justify the negation of a portion of the Maryland tax scheme. Since a certain deference to state authority is normally a hallmark of any Republican administration, support of S. 2447 would have a curious ring.

(4) Political Considerations. This bill may appear to represent "politics as usual" by "Washington insiders" to provide special benefits for Members of Congress and not for other people who for one reason or another are subject to income taxes in more than one state. Without its enactment, a number of Senators and Congressmen will pay higher tax bills next year. Thus, the President's participation in its enactment could make him vulnerable to a political attack.

(5) Recommendation. The President could approve the bill on the grounds that it involves a matter of exclusive concern to the Congress because it affects only certain Members of the Congress and does not affect any other federal interest. Unlike a salary increase for Congressmen, it does not even have an impact on the federal budget. However, if the President believes that he should not by signing the bill become a willing party to special interest legislation passed for the benefit exclusively of certain Members of the Congress, he should veto it. The constitutional considerations of the supporters of the bill appear to have no merit, and if the Congressmen and Senators who voted for the bill truly believe that there are constitutional defects in the Maryland tax scheme as it affects them, they should challenge such schemes in the courts.


Congressional
tax liability

THE WHITE HOUSE

WASHINGTON

July 30, 1976

MEMORANDUM FOR: JIM CANNON

THROUGH: PHIL BUCHEN P.

FROM: KEN LAZARUS K

SUBJECT: Enrolled Bill S. 2447 - Exemption of Members of Congress from State Income Taxes

Counsel's Office has reviewed the attached OMB memorandum on the subject bill and offers the following:

(1) Constitutional Considerations. The arguments advanced by proponents of S. 2447 to the effect that it is constitutionally required are simply without merit.

(a) Congressmen and Senators do not qualify as "instrumentalities of the United States", beyond the reach of Maryland taxes. The folly of this position should be recognized by the fact that this argument would also lead one to the conclusion that Members of Congress cannot be subjected to any taxes imposed by the states which they represent.

(b) Similarly, we do not believe that the Maryland income tax scheme exposes Senators and Congressmen living there to multiple taxation in contravention of the Fourteenth Amendment. Part-time residency alone has long been considered a sufficient nexus for state taxation and the fact that Maryland recognizes a credit for taxes paid to other states on a reciprocal basis generally eliminates the dual state taxation problem.

(c) Maryland imposes a maximum 5 percent state tax on income and also authorizes a 50 percent surcharge imposable at the county level, for an effective tax rate of 7.5 percent. It is true that the county surcharge does not permit any credit for other state taxes, but this feature is only a relatively minor aspect of the bill and would not appear to raise an issue of constitutional dimension.

(2) Equities.

(a) Congressmen and Senators who live in Maryland while representing other states are at a disadvantage over those from other states who live in the District of Columbia or in Virginia. The District and Virginia exempt them from its income tax but also exempt the President and Vice President and appointees of the President who are confirmed by the Senate if they are residents of another state. On the other hand, Congressmen and Senators subject to the Maryland income tax are allowed a credit against the state portion of Maryland tax for income taxes paid to their home states but not against the county portion. This credit does not, however, help those whose home states impose no income tax, and those whose home states tax at a lower rate will have to make up the difference to Maryland.

(b) The sponsors of the bill have not argued that out-of-state Members of Congress should likewise be exempt from state and local property taxes on their homes in or near Washington. So Maryland residents can argue that income taxes are just another form of tax to support the schools and other services from which out-of-state Members of Congress benefit and it is sufficient equity to allow them a credit against the state portion of the Maryland income tax for income taxes paid to their home states.

(3) Federalism. It is, of course, difficult to perceive a Federal interest in these circumstances sufficient to justify the negation of a portion of the Maryland tax scheme. Since a certain deference to state authority is normally a hallmark of any Republican administration, support of S. 2447 would have a curious ring.

(4) Political Considerations. This bill may appear to represent "politics as usual" by "Washington insiders" to provide special benefits for Members of Congress and not for ~~when~~ other people who for one reason or another are subject to income taxes in more than one state. Without its enactment, a number of Senators and Congressmen will pay higher tax bills next year. Thus, the President's participation in its enactment could make him vulnerable to a political attack.

(5) Recommendation. The President could approve the bill on the grounds that it involves a matter of exclusive concern to the Congress because it affects only certain Members of the Congress and does not affect any other federal interest. Unlike a salary increase for Congressmen, it does not even have an impact on the federal budget. However, if the President believes that he should not by signing the bill become a willing party to special interest legislation passed for the benefit exclusively of certain Members of the Congress, he should veto it. The constitutional considerations of the supporters of the bill appear to have no merit, and if the Congressmen and Senators who voted for the bill truly believe that there are constitutional defects in the Maryland tax scheme as it affects them, they should challenge such schemes in the courts.

THE WHITE HOUSE

ACTION MEMORANDUM WASHINGTON LOG NO.:

Date: July 29 Time: 930am

FOR ACTION: Paul Leach
Max Friedersdorf
Ken Lazarus
Steve McConahey
Dick Parsons

cc (for information): Jack Marsh
Jim Cavanaugh
Ed Schmults

FROM THE STAFF SECRETARY

DUE: Date: July 30 Time: noon

SUBJECT:

S. 2447-Exemption of Members of Congress from State Income Taxes

ACTION REQUESTED:

____ For Necessary Action

____ Prepare Agenda and Brief

__x__ For Your Comments

____ For Your Recommendations

____ Draft Reply

____ Draft Remarks

REMARKS:

please return to judy johnston, ground floor west wing

PLEASE ATTACH THIS COPY TO MATERIAL SUBMITTED.

If you have any questions or if you anticipate a delay in submitting the required material, please telephone the Staff Secretary immediately.

James M. Cannon
For the President

THE WHITE HOUSE
WASHINGTON

7/28/76

TO: JAMES CAVANAUGH

Robert D. Linder

EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
WASHINGTON, D.C. 20503

JUL 28 1976

MEMORANDUM FOR THE PRESIDENT

Subject: Enrolled Bill S. 2447 - Exemption of Members of Congress from State income taxes
Sponsor - Sen. Hruska (R) Nebraska and Sen. Eastland (D) Mississippi

Last Day for Action

August 3, 1976 - Tuesday

Purpose

To provide that Members of Congress may not, for purposes of State income tax laws, be treated as residents of any State other than the State from which they were elected.

Agency Recommendations

Office of Management and Budget	Approval
Department of Justice	No objection (Informally)
Department of the Treasury	No Recommendation
Advisory Commission on Intergovernmental Relations	No Recommendation (Informal

Discussion

The enrolled bill would provide that no State or locality may levy income taxes on Members of Congress who maintain an abode within such jurisdictions and away from their home for purposes of attending sessions of Congress. The term "Member of Congress" would include delegates from the District of Columbia, Guam, and the Virgin Islands, and the Resident Commissioner from Puerto Rico and the term "State" would include the District of Columbia.

Existing Virginia and District of Columbia laws exempt out-of-State Members of Congress from Virginia and District income taxes. Maryland law, however, contains no such exemption. Therefore, the practical effect of the enrolled bill would be to prevent the State of Maryland from levying income taxes on Members of Congress who reside in, but are not elected from, that State. S. 2447 would not, however, affect in any way the tax liability of a Member to his home State and locality.

Proponents of this bill have based their support of it on the following arguments which were presented in the Senate report on S. 2447:

(1) By law, no State can tax an instrumentality of the United States Government; therefore, Members of Congress "being the embodiment of the Legislative branch of government are such an instrumentality and immune from taxation by a state."

(2) Because the Constitution requires that a Senator or Representative must be an inhabitant, i.e., resident, of the State he represents when elected, a determination by any other State that a Member is a resident for any purpose infringes on this Constitutional requirement and the Member's right to stand for reelection.

(3) Multiple taxation of Members of Congress who maintain residences both in their home State and in or near Washington for purposes of attending sessions of Congress violates the due process and equal protection clauses of the fourteenth amendment. In this connection the Senate report also noted that only credit toward the Maryland State income tax is allowed for taxes paid to another State. However, Maryland also collects income taxes on behalf of its counties as an add-on-percentage of the State income tax; no credit for the county income tax is allowed for taxes paid to another State.

Proponents of the proposed legislation have also pointed out that enactment of the bill would not exempt Members of Congress from property or sales taxes levied by the State of physical residence. Moreover, the revenue that Maryland would lose by enactment of this legislation would in part be offset by the very generous Federal impact aid payments made to Maryland suburban counties for the education of the children of Federal employees, including the children of the approximately 125 Congressmen who live in Maryland.

Opponents of the bill, many of whom are members of the Maryland congressional delegation, have opposed S. 2447 chiefly on the grounds of fairness and equity. During the Senate floor debate on the bill, Senators Beall and Mathias argued that Members of Congress living in Maryland had an obligation to contribute to the payment for public services which they use and which they enjoy. While acknowledging that there is a real problem for those Members whose home States exact an income tax but do not allow reciprocity for the tax levied by Maryland, the Maryland Senators urged that the preferable alternative to enactment of S. 2447 was for those out-of-State Members of Congress maintaining a residence in Maryland to attempt to bring Maryland and their home State into reciprocity.

The opponents have also criticized this proposed legislation because it would grant special tax exemption to Congressmen while continuing to deny similar treatment to other citizens who also are compelled to take up "temporary" residence in the Washington area. Such individuals would include Presidentially-appointed Federal officials who, while maintaining a permanent residence in their home State, must also pay Maryland, District of Columbia, or Virginia income taxes during their Washington assignment.

S. 2447 passed the Senate by voice vote on February 18, 1976; it passed the House by 310 to 84 on July 20, 1976.

While the equity and fairness arguments advanced by opponents of S. 2447 have merit, the Justice Department has indicated informally that it does not believe that Congress has exceeded its constitutional powers in enacting this legislation. We believe therefore that, in the absence of clear grounds for a constitutional challenge, there is not sufficient reason to oppose the Congress' judgment to exempt itself from out-of-State income taxes.

James M. Frey

Assistant Director
for Legislative Reference

Enclosures

THE GENERAL COUNSEL OF THE TREASURY
WASHINGTON, D.C. 20220

JUL 22 1976

Director, Office of Management and Budget
Executive Office of the President
Washington, D. C. 20503

Attention: Assistant Director for Legislative Reference

Sir:

Reference is made to your request for the views of this Department on the enrolled enactment of S. 2447, "To amend title 4 of the United States Code to make it clear that Members of Congress may not, for purposes of State income tax laws, be treated as residents of any State other than the State from which they were elected."

The enrolled bill would provide that a Member of Congress does not have to pay the income tax levied by a State or political subdivision thereof in which the Member maintains a place of abode for the purpose of attending Congress. The enrolled enactment would serve to prevent Maryland from levying an income tax on Members of Congress as Members are already exempted from paying Virginia and District of Columbia income taxes.

Since the enrolled enactment would have no effect on the Federal revenues and is not otherwise of primary interest to this Department, we have no recommendation to make concerning whether it should be approved by the President.

Sincerely yours,

General Counsel

Union Calendar No. 664

94TH CONGRESS
2D SESSION

S. 2447

[Report No. 94–1271]

IN THE HOUSE OF REPRESENTATIVES

FEBRUARY 19, 1976

Referred to the Committee on the Judiciary

JUNE 16, 1976

Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

AN ACT

To amend title 4 of the United States Code to make it clear that Members of Congress may not, for purposes of State income tax laws, be treated as residents of any State other than the State from which they were elected.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That (a) chapter 4 of title 4 of the United States Code is amended by adding at the end thereof the following new section:

"§ 113. Residence of Members of Congress for State income tax laws

"(a) No State, or political subdivision thereof, in which a Member of Congress maintains a place of abode for purposes of attending sessions of Congress may, for purposes of

any income tax (as defined in section 110(c) of this title) levied by such State or political subdivision thereof—

"(1) treat such Member as a resident or domiciliary of such State or political subdivision thereof; or

"(2) treat any compensation paid by the United States to such Member as income for services performed within, or from sources within, such State or political subdivision thereof,

unless such Member represents such State or a district in such State.

"(b) For purposes of subsection (a)—

"(1) the term 'Member of Congress' includes the delegates from the District of Columbia, Guam, and the Virgin Islands, and the Resident Commissioner from Puerto Rico; and

"(2) the term 'State' includes the District of Columbia.".

(b) The table of sections for such chapter 4 is amended by adding at the end thereof the following new item:

"113. Residence of Members of Congress for State income tax laws.".

Passed the Senate February 18, 1976.

Attest: FRANCIS R. VALEO,

Secretary.

Union Calendar No. 664

94TH CONGRESS
2D SESSION

S. 2447

[Report No. 94–1271]

AN ACT

To amend title 4 of the United States Code to make it clear that Members of Congress may not, for purposes of State income tax laws, be treated as residents of any State other than the State from which they were elected.

FEBRUARY 19, 1976

Referred to the Committee on the Judiciary

JUNE 16, 1976

Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

THE WHITE HOUSE

WASHINGTON

July 23, 1976

MEMORANDUM FOR: JACK MARSH
JIM LYNN
MAX FRIEDERSDORF

FROM: PHILIP BUCHEN

SUBJECT: Federal Legislation to Relieve Members of Congress From Paying Maryland Income Tax

Bob Griffin called and asked that we look carefully at this legislation before formulating our position. He indicates that Congressmen who have their second homes either in the District of Columbia or in Virginia are exempted from the District or state income taxes. Moreover, he refers to the Senate Judiciary Committee report on this legislation which makes a case that it is unconstitutional for Maryland to tax the incomes of Congressmen who are also subject on the same income to taxation by the states of their permanent residence.

cc: Ken Lazarus

Calendar No. 604

94TH CONGRESS
2d Session

SENATE

REPORT
No. 94-631

CONGRESSIONAL TAX LIABILITY

FEBRUARY 6, 1976.—Ordered to be printed

Mr. HRUSKA, from the Committee on the Judiciary, submitted the following

REPORT

[To accompany S. 2447]

The Committee on the Judiciary to which was referred the bill (S. 2447), to amend title 4 of the United States Code to make it clear that Members of Congress may not, for the purposes of State income tax laws, be treated as residents of any State other than the State from which they were elected, having considered the same, reports favorably thereon and recommends that the bill do pass.

STATEMENT

HISTORY OF THE LEGISLATION

The bill was introduced on October 2, 1975. A similar bill, H.R. 8904, was introduced in the House on June 24, 1975.

NATURE AND SCOPE OF THE LEGISLATION

The founding fathers, in order to insure that the people were properly represented, Constitutionally required that members of Congress be inhabitants of the state from whence they are elected. Because of this Constitutional provision most members of Congress, unlike other individuals, are legally required to maintain a residence in their home state while at the same time, in view of geographic considerations, find it necessary to establish an abode in or near Washington, D.C.

The purpose of the legisltion is to provide for equal state income tax treatment for those Congressmen who are subject to state income tax assessment in their elective state or congressional district and in the place of their Capitol abode.

57-010

Members of Congress who for reasons of distance are required to maintain their abode near the United States Capitol in order to discharge their duties normally do so in the states of Virginia and Maryland or in the District of Columbia.

The District and the Commonwealth of Virginia both expressly exempt members of the Congress under their income tax statutes. D.C. Code § 47–551 (C) (S), Virginia Code, Sec. 58–151.02(e)(1)(i).

No similar exemption is provided by the State of Maryland.

The Maryland Code provides for an income tax on substantially all the income of "residents" of Maryland. A resident is defined as "an individual domiciled in this State on the last day of the taxable year, and every other individual, who, for more than six months of the taxable year, maintained a place of abode within this State, whether domiciled in this State or not; but any individual, who, on or before the last day of the taxable year, changes his place of abode to a place without this State, with the bona fide intention of continuing to abide permanently without this State, shall be taxable as a resident of this State for the portion of the taxable year in which he resided in this State, and as a nonresident of the State for the remainder of the taxable year. The fact that a person who has changed his place of abode within six months from so doing again resides in this State, shall be prima facie evidence that he did not intend to have his place of abode permanently without this State." Md. Ann. Code, Art. 81, Sec. 279(i).

Only limited tax credits are available to Maryland residents who are entitled to a credit against Maryland tax for tax paid to other states on the income taxable by Maryland. Md. Ann. Code, Art. 81 Sec. 290. Maryland also collects income taxes on behalf of its counties as an add-on percentage of the state income tax. No credit toward this tax is allowed for taxes paid to another state. (See Senate Bill No. 23, Chapter 3, Laws 1975, approved February 11, 1975 amending Article 81, Section 290 of the annotated Code of Maryland.)

The action of the State of Maryland taxing members of Congress from other states who maintain an abode in Maryland for the purposes of being near the U.S. Capitol raises serious Constitutional questions.

1. No State can tax an instrumentality of the United States Government. *McCulloch v. Maryland*, 4 Wheat. 316 (1819). Congressmen being the embodiment of the Legislative Branch of government are such an instrumentality and immune from taxation by a state.

2. The Constitution provides that each Senator and each Representative must be an inhabitant of the state he represents when elected. Art. I Secs. 2, 3. Inhabitant and resident are synonymous. This provision implies that the member shall cotninue to be an inhabitant to preserve his right to stand for reelection. The ability of any other state to determine that a member is a resident for any purpose infringes on the Constitutional requirement and right of reelection.

3. Multiple taxation of Senator and Representatives by several jurisdictions, based simply on the fact of physical location necessary to the performance of constitutional duties, violates the due process and equal protection clauses of the fourteenth amendment.

Approximately twenty-five Senators and one hundred Representatives maintain abodes in Maryland. The bill will insure that these Constitutional principles are abided with and prevent needless litigation.

Constitutional Considerations

State taxation of instrumentalities of the federal government

A research of this subject reveals no previous attempt of a state to tax the income of members of Congress because of their physical location incident to service in Congress. Therefore, no direct decisions exist on the question of immunity of Senators or Representatives from income tax of states other than the state that they represent. However, since the time of the inception of the Republic, when Maryland attempted to tax the Federally-created Bank of the United States, it has been established that no state can tax an agency or instrumentality of the United States Government. McCulloch v. Maryland, *supra*.

An agency or instrumentality of the United States Government has, for this purpose, been broadly construed to include not only the departments and regulatory commissions of the Government, but also public corporations such as the Federal Land Bank (see *Federal Land Bank* v. *Bismark Lumber Co.*, 314 U.S. 95 (1941)) and the Home Owners Loan Corporation (see *Pittman* v. *Home Owners Loan Corp.*, 308 U.S. 21 (1939)). The states may only tax properties, functions, and instrumentalities of the Federal Government with the express consent of Congress. *Kern-Limerick Inc.* v. *Scurlock*, 347 U.S. 110 (1954); *Reconstruction Finance Corporation* v. *Beaver County*, 328 U.S. 204 (1946).

Until relatively recently, the courts had held that the states cannot levy a tax upon the income of Federal employees because to do so was indirectly a tax by the states on the Federal Government. See *Dobbins* v. *Commissioners of Erie County*, 16 Pet. 435 (1842); *New York ex rel Rogers* v. *Graves*, 299 U.S. 401 (1937). Conversely, the Federal Government could not tax state officials. See *Collector* v. *Day*, 11 Wall. 113 (1870).

In 1938, the Supreme Court decided the case of *Helvering* v. *Gerhardt*, 304 U.S. 405, holding that the Federal Government could tax a state employee, specifically an employee of the Port of New York Authority, even though the Authority itself was not subject to taxation.

In the case of *Graves* v. *New York*, 306 U.S. 466 (1939), the Supreme Court considered again whether a state could impose an income tax upon a Federal employee, in this case, an employee of the Home Owners Loan Corporation. The Supreme Court held that the corporation itself was immune from state taxation, but that the income of an employee was personal and a tax on such income did not impose a burden on the agency. The Court made it clear that no state could tax the agency itself. "[W]hen the National Government lawfully acts through a corporation which it owns and controls, those activities are governmental functions entitled to whatever tax immunity attaches to those functions when carried on by the Government itself through its departments." 306 U.S. at 477. The Court strongly implied that if Congress chose to exempt the incomes of Federal agency employees from state income taxation, the exemption would be effective. See 306 U.S. at 479, 480. In the *Graves* case, however, the Court found that there was no basis for inferring an intention of Congress to exempt the income of employees of the corporation. See 306 U.S. at 485.

The case of a Federal employee is totally different in essence from the situation of a member of Congress. A Federal employee is not constitutionally forced to maintain an abode away from his home state; he may readily become a citizen of the state where he is employed. His employment is not necessarily temporary or uncertain; he has not been chosen to represent citizens as their representative, but is pursuing a personal career. As an employee, he is not an agency of the Government. His employment is not basic to the maintenance of the Government. *Helvering* v. *Gerhardt*, 304 U.S. 405, 418, 424 (1938).

On the other hand, a member of Congress is not engaged merely in the pursuit of his personal career. Being a member of Congress, he is on more and no less than a representative of his constituents. He may run for office, but must be elected by the people. In this basic sense, he cannot select the occupation of Senator or Representative.

Moreover, Congress is not merely a Federal agency or instrumentality; it is a fundamental branch of the Federal Government created by the Constitution directly. Article I of the Constitution provides that all legislative powers of the Federal Government shall be vested in the Congress, consisting of the Senate and House of Representatives. It further provides that the Senate and House shall be composed of members elected by the people of the several states. The Congress, therefore, is simply an aggregation of its members. A tax on the incomes of the Senators and Representatives is a tax on the Congress, as a tax on the income of the Bank of the United States, or the powers or functions of such a bank, would be a tax on a Federal Government agency.

Members of Congress are not Federal employees, and the decision in the *Graves* case, *supra*, allowing a state to tax the salary of an employee of the Home Owners Loan Corporation is not applicable. Under the Public Salary Tax Act of 1939, as amended in 1966, Congress consented to non-discriminatory taxation of the compensation of a Federal "officer" or "employee" by duly constituted taxing authorities "having jurisdiction." 4 U.S.C. Sec. 111.

The terms "officer" and "employee" are not defined for the purposes of the Public Salary Tax Act and there is nothing in that Act to indicate a consent to state taxation of members of Congress. In fact, the terms "officer" and "employee" are not usually defined to include members of Congress. See, *e.g.*, 5 U.S.C. Secs. 2104, 2105, and 2106 (providing for different definitions of "officer," "employee," and "Member of Congress" for the purposes of Title 5 of the United States Code).

The conclusion, therefore, is that a tax on a Congressman by a state, based on his compensation for serving in the Congress, is a tax on the legislative branch of the Federal Government—which no state may impose.

Exemption because the Maryland Definition of "Resident" Is Here Invalid

The Constitution provides that a Representative or a Senator must "when elected, be an inhabitant of that state in which he shall be chosen." Art. I, Secs. 2, 3. Although literally these provisions do not require that a Senator or Representative continue to be an inhabitant

of the State that he represents *after* his election, there is no question in practice, usage, and construction that Senators and Representatives are deemed to continue to be inhabitants of their respective states during their terms of office. Otherwise, no member of Congress could ever be re-elected, except from the states of Virginia and Maryland. That is, if a Senator from Alaska, who lives in the State of Maryland during his term of office, is deemed to be a resident of Maryland rather than an inhabitant of Alaska, he could not run for re-election.[1] Since the Constitution requires each Senator and Representative to be an inhabitant (*i.e.*, resident) of the state that he represents, it is concluded that no definition in any state statute purporting to make him a resident (or inhabitant) of any other state is constitutionally valid.

Since the Constitution prohibits treating Senators and Representatives as residents (or inhabitants) of any state other than the one they represent, it follows that Maryland lacks the legislative jurisdiction to tax the income of Senators and Representatives other than its own. It has long been established that a state has no authority to tax the income of a nonresident derived from sources outside that state.

> Where there is jurisdiction neither as to person nor property, the imposition of a tax would be *ultra vires* and void. If the legislature of a state should enact that the citizens or property of another state or county should be taxed in the same manner as the persons and property within its own limits and subject to its own authority, or in any manner whatsoever, such a law would be as much a nullity as if in conflict with the most explicit constitutional inhibition.

St. Louis v. *The Ferry Company*, 11 Wall. 423, 430 (1870), quoted with approval in *Miller Bros. Co.* v. *Maryland*, 347 U.S. 340, 342 (1954); *accord*, *Dewey* v. *Des Moines*, 173 U.S. 193 (1899).

The statutory provisions of Virginia and the District of Columbia are regarded as simple recognitions of the fact that each Senator and Representative is in law a resident of the state which he represents, and not any other state. In a basic sense, the location of any Senator or Representative in the jurisdictions adjacent to the Capitol is a necessary incident to the proper carrying on of constitutional duties. Since Senators or Representatives cannot inhabit the air above the buildings of Congress, they are bound to live in one of the surrounding jurisdictions, be it the District of Columbia, Virginia, or Maryland. Their physical presence in one of these jurisdictions does not make them local "residents" in a constitutional sense, and does not give

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[1] The words "resident" and "inhabitant" are for these purposes synonymous or virtually synonymous. The *Oxford Universal Dictionary* (3d Ed.) defines an "inhabitant" as "a human being . . . dwelling in a place, a permanent resident." A "resident" is defined as "one who resides permanently in a place; sometimes spec. applied to inhabitants."

"In its general and popular sense, the word 'inhabitant' is the same as 'resident,' or one who lives in a place." *New Haven* v. *Bridgeport*, 37 A. 307 (Conn. 1897). When employed in statutes, the term "inhabitant" has been held to be equivalent to the word "resident." *E.g.*, *Shaw* v. *Quincy Mining Company*, 145 U.S. 444 (1892); *ARO Manufacturing Co.* v. *Automobile Research Corp.*, 352 F.2d 400 (1st Cir. 1965). In considering qualifications of Congressmen, the former House Committee on Elections defined the term "inhabitant" as it is used in Article I, Sections 2, 3 of the Constitution as follows: "This term is the legal equivalent of the term 'resident' . . . ." *Scott, Hinds' Precedents of the House of Representatives*, Vol. I, Sec. 439, p. 429. See also *Pigott, id.*, Vol. I, Sec. 369; *Bailey, id.*, Vol. I, Sec. 434.

the state wherein they live authority to tax them on their compensation as Federal legislators.[2]

The view set forth here is directly supported by decisions of the former Committee on Elections of the House of Representatives.

In determining whether persons were inhabitants of the states from which they had been elected, that Committee frequently declared that inhabitancy was the equivalent of residence and that two factors—where did he vote and to what state did he pay taxes—were the important determinants of inhabitancy. See *Updike* v. *Ludlow*, *Cannon's Precedents of the House of Representatives*, Vol. VI. Sec. 55; *Beck*, *id.*, Vol. VI, Sec. 174. To permit Maryland to impose incomes taxes on a non-Maryland Congressman who lives in Maryland in order to attend to his Congressional duties, would be to attach one of the most important indicia of inhabitancy to a state other than the one which he represents. The result could be to bar that Congressman from representing his home state (the representation of which was the very reason for his maintaining living quarters in Maryland). In a case like this, where the provisions of the United States Constitution and a state statute are in conflict, the supremacy clause requires that the state statute give way.

In the *Beck* case, the Committee observed—

> We do not think that the framers of the Constitution intended by the use of the word "inhabitant" that the anomalous situation might ever arise that man should be a citizen, a legal resident, and a voter within a given State and yet be constitutionally an inhabitant elsewhere. If any such conclusion could be reached we might have the peculiar result in this country of a man being a resident, a citizen, and a voter in a given State, and yet within the constitutional sense barred from the right of representing a district in that State in Congress, but having the right to represent a district in another State in Congress. No such interpretation can fairly be read into this provision.

Consistently with this view, a member of Congress from another state does not become an inhabitant or resident of Maryland because he lives there during his term of office, even if Maryland statutes purport to say otherwise.

This view receives further reinforcement from the Soldiers' and Sailors' Civil Relief Act of 1940, which in Section 514 provides that military or naval personnel may not, for purposes of state income taxation, "be deemed . . . to have acquired a residence or domicile in, or to have become resident in or a resident of, any other state, territory, possession, or political subdivision . . . or the District of Columbia" by reason of compliance with military or naval orders. This legislation is binding upon the states (including Maryland).

[2] It should be noted that Senators and Representatives are subject to local property taxes, which are inherently *in rem* taxes. They are also subject to a variety of excise taxes, such as sales taxes on transactions. Thus, there is no question that they lend substantial financial support to the jurisdictions in which they live.

If the states could constitutionally determine "residence" as they pleased for tax purposes, the Soldiers' and Sailors' Civil Relief Act would be invalid as an encroachment by Congress on powers of the states. This is not the case. See *Dameron* v. *Brodhead*, 345 U.S. 322 (1953).

Due Process and Equal Protection

To subject members of Congress to local income taxes because of their abode in a state near the Capitol is to subject them, in most cases, to double taxation as a result of their constitutional fuctions and duties. They are required constitutionally to be and remain citizens of the states they represent, and to be subject to taxes as citizens of their home states. If the Maryland statute were applicable, they would be required additionally to pay taxes to Maryland. In accord with this view, this would deny them due process and equal protection of the laws.

Again, the case of a member of Congress with that of a Federal employee is contrasted. A Federal employee will ordinarily have one domicile and one residence. He will be subject, as a resident or a domiciliary, to income tax in only one state or jurisdiction. Unless the Maryland definition of "resident" is struck down, however, a member of Congress from a state other than Maryland, who lives in Maryland, will automatically be subject to double taxation.

Moreover, this is a classical case of taxation without representation. A Senator from Utah obviously votes in Utah, and cannot vote in Maryland. Although he is not and cannot be a citizen of Maryland, and does ont participate in its government, the Maryland income tax law wrongfully purports to tax him.

In this respect, the situation of a member of Congress is unique, and the uniqueness is a direct result of the constitutional requirements for election. The result, if Maryland's right to tax were upheld, would be grossly discriminatory and unfair.

It may be contended that since Maryland recognizes a credit for taxes paid to other states, most of double taxation is obviated. There are several responses to this fallacious argument. First, to the extent that Maryland taxes are at a higher rate than home state taxes, there is double taxation in the amount of the excess. Second, the recent Maryland statute indicates an intention to allow only a partial credit. Thus, Maryland's top tax bracket is 5%, but county taxes may be an additional 2½%. A Senator or Representative from a state imposing a 10% income tax will pay an aggregate 12½% tax. A Senator or Representative from a home state imposing a 3% tax will pay an aggregate tax of 7½%. A Senator or Representative from a home state imposing a 6% tax will pay an 8½% tax.

Finally, it should be noted that the interstate credit depends on reciprocity, and is, in any event, a matter of grace. As Maryland has recently provided with respect to so-called county taxes, the credit can be partially or wholly eliminated, leading to complete double taxation.

The unfair character of a Maryland tax on out-of-state Congressmen may be illustrated with respect to specific transactions. A Representative from Montana owns a ranch in Montana which he sells at a capital gain of $50,000. Although Maryland has nothing whatever to do with this transaction, if the Representative maintains premises in Maryland, the State will presumably attempt to tax the Montana gain in its entirety. Yet, the transaction has no Maryland connection in any meaningful sense.

Finally, while the problem we are considering is relatively discrete at the present time because Maryland income taxes are fairly low, nothing prevents the State from increasing its rate to as high a range as it pleases. Under circumstances of very high rates, double taxation of members of Congress could lead to making Congressional positions untenable for persons of limited means. In this sense, a free-handed power to impose double taxes is indeed, as Chief Justice Marshall observed in the *McCulloch* case, the "power to destroy." What would be destroyed, of course, would be the equal opportunity for persons of limited means, as well as those of great means, to become members of Congress. The "door of this part of the federal government" heretofore "open to merit of every description . . . without regard to poverty or wealth" would be closed. *The Federalist*, No. 52; *cf. Bullock* v. *Carter*, 405 U.S. 134 (1972) (forbidding large filing fees from barring candidates for public office); *Williams* v. *Rhodes*, 393 U.S. 23 (1968).

Explanation of the Legislation

The bill provides that no state or political subdivision thereof in which a member of Congress maintains a place of abode for purposes of attending sessions of Congress may for state or subdivision income tax purposes treat the member as a resident or domiciliary or treat any income paid by the United States as income for services performed within or from sources within such State or political subdivision thereof unless such member represents such State or a district of such State.

The bill also provides equal treatment for delegates from the District of Columbia, Guam and the Virgin Islands and the Resident Commissioner from Puerto Rico. The District of Columbia is included within the prohibitions of the amendment. It is the intention of the Committee that the bill shall apply to any past accrued tax liabilities of the nature encompassed within this legislation not yet paid the State or political subdivision.

Cost of Legislation

In compliance with Sec. 252(a)(1) of the Legislative Reorganization Act of 1970, as amended (2 U.S.C. 190j), the Committee estimates that there will be no cost to the Federal government in carrying out the provisions of this legislation.

Section-by-Section Summary

Sec. 113.—Provides that no State or political subdivision thereof in which a Member of Congress maintains a place of abode for purposes

of attending sessions of Congress may for the purposes of any income tax:

1. Treat such member as a resident or domiciliary;
2. Treat any compensation paid by the United States to such member as income for services performed within, or from sources within such State or political subdivision, unless such member represents such State or district in such State.

For the purposes of this Section the term "Member of Congress" includes the delegates from the District of Columbia, Guam, and the Virgin Islands, and the Resident Commissioner from Puerto Rico. The term State includes the District of Columbia.

Recommendation

For the foregoing reasons, the Committee on the Judiciary favorably reported S. 2447 with the recommendation that it do pass.

Changes in Existing Law

In compliance with Subsection (4) of Rule XXIX of the Standing Rules of the Senate, the new language to be added by this bill is printed in italic:

TITLE 4, CHAPTER 4, UNITED STATES CODE

* * * * * * *

"§ 113. Residence of Members of Congress for State income tax laws

"(a) No State, or political subdivision thereof, in which a Member of Congress maintains a place of abode for purposes of attending sessions of Congress may, for purposes of any income tax (as defined in section 110(c) of this title) levied by such State or political subdivision thereof—

"(1) treat such Member as a resident or domiciliary of such State or political subdivision thereof; or

"(2) treat any compensation paid by the United States to such Member as income for services performed within, or from sources within, such State or political subdivision thereof,

unless such Member represents such State or a district in such State.

"(b) For purposes of subsection (a)—

"(1) the term 'Member of Congress' includes the delegates from the District of Columbia, Guam, and the Virgin Islands, and the Resident Commissioner from Puerto Rico; and

"(2) the term 'State' includes the District of Columbia.".

(b) The table of sections for such chapter 4 is amended by adding at the end thereof the following new item:

"113. Residence of Members of Congress for State income tax laws.".

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