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No Taxation without Representation in Court! **by Sheldon Richman**

The July 4th holiday readily brings to mind the phrase “no taxation without representation.” A major reason for the Americans’ wish to be independent from the British empire was their belief that people should have a say in the tax policies imposed on them.

Well, we got representation — and a whole lot more taxes too. Is representation the taxpayers’ only recourse? Perhaps the courts could provide another form of recourse. If the government is supposed to be bound by the Constitution, then shouldn’t taxpayers be able to sue the government when their money is used improperly?

Alas, that’s not how the courts see it.

Last week the U.S. Supreme Court ruled — once again — that merely being a taxpayer confers no standing to sue the government when it spends money unconstitutionally. The 5-4 decision in *Hein v. Freedom from Religion Foundation* left intact the Bush administration’s power to run its Faith-Based Organization and Communities Initiative. The Freedom from Religion Foundation (FFRF) filed suit after officials of the Bush administration held conferences and gave speeches to encourage the participation of religious groups in the Faith-Based Initiative. The purpose of this program is to permit religious social-service organizations to compete with secular organizations for taxpayer money to carry out various government purposes, such as drug counseling. FFRF argued that using tax money for religious beneficiaries violates the First Amendment’s Establishment Clause, which states, “Congress shall make no law respecting establishment of religion.”

The Court did not say the plaintiff’s argument had no constitutional merit. It said that simply being a taxpayer does not qualify a person to make that argument in court.

The Supreme Court has allowed one exception to its rule against taxpayer suits. If a specific congressional appropriation violates the Establishment Clause, a taxpayer can sue. But a majority of justices said the FFRF case doesn’t qualify because a presidential order, not Congress, authorized spending on the Faith-Based Initiative. Why that distinction should matter is anyone’s guess.

What explains this bad attitude toward taxpayer suits? The answer given is that no taxpayer is specifically harmed by the spending. As the Supreme Court put it previously, “Interest in the moneys of the Treasury ... is shared with millions of others; is comparatively minute and indeterminable; and the effect upon future taxation, of any payment out of the funds, so remote, fluctuating and uncertain, that no basis is afforded for an appeal to the preventive powers of a court of equity.”

In the FFRF case Justice Antonin Scalia added, “Is a taxpayer’s purely psychological displeasure that his funds are being spent in an allegedly unlawful manner ever sufficiently concrete and particularized to support ... standing? The answer is plainly no.”

Another rationale for not permitting the suits is that they would prompt a violation of the separation of powers. As Justice Anthony Kennedy wrote, “Permitting any and all taxpayers to challenge the content of ... executive operations and dialogues would lead to judicial intervention so far exceeding traditional boundaries on the Judiciary that there would arise a real danger of judicial oversight of executive duties.”

Justice Samuel Alito added another reason: “In light of the size of the federal budget, it is a complete fiction to argue that an unconstitutional federal expenditure causes an individual federal taxpayer any measurable economic harm. And if every federal taxpayer could sue to challenge any Government expenditure, the federal courts would cease to function as courts of law and would be cast in the role of general complaint bureaus.”

To all of which, one may ask, so what? Who’s supposed to be in charge, the government or the people?

Taxpayer standing may seem like an arcane technical legal issue of little consequence for freedom. But that’s not the case. It’s critical to keeping government on a short leash.

Isn’t that why our ancestors revolted?

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