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Marc Linder Responds to Silver and Forman

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To the Editor:

Of the two critics of my article "What Hath Zoe Baird Wrought?" (Tax Notes, Jan. 2, 1995, p. 113), Tom Silver (see above) voices the narrow-minded personal interests of high-income professional employers of domestic workers masquerading as antipaternalistic social policy. Jonathan Forman (see Tax Notes, Jan. 30, 1995, p. 741), in contrast, does address a policy issue; unfortunately, this well-meaning but confused antagonist is so obsessed with using the original article as a vehicle for creating yet another forum for propagating his own pet proposal that he has missed the whole point of the piece.

As a securities dealer at Shearson Lehman Brothers and certified financial planner, Mr. Silver was wont to deliver himself of this kind of oracular investment advice: "an investment is...like a fine tool which...must fit your comfort level like a hand in glove, and must be discarded when it is no longer able to do the job..."[^1] What sort of financial planning glove does Mr. Silver, who later advanced to senior vice president of investments at Shearson Lehman[^2], extend to his maids, whom he regards as "competent businessperson[s]" imposing "take-it-or-leave-it" deals on domestic workers at almost any price, for many others cost is surely a consideration. And given the not uncommon demand by domestic workers who do consent to be paid on the books that the employer pay all of the worker's income and Social Security taxes, many households are simply priced out of the market for domestic workers.

Marc Linder's answer to this argument is the modern-day equivalent of "Let them eat cake." In a letter to this writer in December 1994, Mr. Linder commented, "People who can't afford or are too cheap to pay the full social wage to 'domestic help,' should scrub their own toilets." He might as well have added, "And to hell with the domestic worker who thereby didn't get hired."

Sincerely,

Tom Silver
Morristown, New Jersey
January 20, 1995

him and his hapless colleagues? (At least Mr. Silver refrains from rehashing venerable canards about the "queens in the kitchen" who demanded that the "lady of the house must serve [them] a bowl of hot soup every night in bed."). As far as Mr. Silver is concerned, "domestic workers exist as human beings with ... individual desires (such as ... the desire to get rich)" — for example, by evading the Social Security system. Has he successfully counseled his maids to realize that American dream of riches, like thousands of maids before them, by saving up the princely emoluments that cleaning toilets yielded and adding to that sum the prodigious amounts of FICA tax that they coerced Mr. Silver into kicking back to them?

Mr. Silver apparently believes that, unlike his rich clients, maids do not require his services to measure their hand for an investment glove because that hand is too busy helping them live hand-to-mouth to register on the comfort meter. Or in words amounting to self-caricature: "domestic workers might make a comparison of Social Security as some far-off, indeterminate income stream, with a here-and-now incremental stream (the foregone annual tax liability) forfeitable by virtue of a Social Security tax trail — and find the Social Security alternative wanting. [T]he workers may prefer a bird in the hand to a bird in the bush. Such preference is hardly irrational, and probably is a core tenet of domestic workers who oppose Mr. Linder's views."

The bird they would really like is other employment. For as even the very conservative U.S. News & World Report acknowledged, a "shortage of domestics" stems from "low pay [and] the stigma of servitude often attributed to domestic work...." It might come as a shock to Mr. Silver to learn that at the time domestic employees first gained coverage, many of those "from European countries with more comprehensive social-security systems than ours [were] disappointed that their S.S.A. coverage doesn't include health insurance." The "tenet" that Mr. Silver imputes to his maids is curiously redolent of the countless bellrings that high-salaried clients presumably have been exchanging around the rich man's equivalent of the cracker barrel with their investment advisors ever since 1935. It is these people who complain that the state forces them to siphon off part of their "earned" income into a common pot with the polloi rather than being permitted to invest it as they and the investment counselors of the world see fit. Or perhaps Mr. Silver would have us believe that many is the time his maids qua clients have sought his advice on how to invest their hoarded FICA pennies.

Mr. Silver might have written a more provocative — though hardly novel — reply had he had the courage of his convictions and revealed his real agenda; for what he really desires is the wholesale liquidation of the compulsory Social Security system. Instead of openly urging such repeal at a time when not even the temporarily ascendant market-knows-best Republicans dare frighten the electorate with such a demand, Mr. Silver offers the worst possible case for his scheme by focusing on the groups for whom old-age pensions, disability insurance, and unemployment compensation are an absolute precondition of a minimal existence — but whom Mr. Silver happens to employ. As was recognized even before Congress incorporated domestic employees into Social Security: "[I]n the absence of the other social insurances — workmen's compensation, unemployment compensation, hospital plans — the savings of household employees are often wiped out before old age makes self-support impossible."  

Forty years ago, people expressing Mr. Silver's views were seen mostly wandering about Times Square wearing sandwich signs with slogans like: 'Abolish Slavery — Repeal Social Security.'

Eliminating the mandatory and quasi-universal character of social insurance would be tantamount to its termination. As Congress noted at the time it conferred coverage on domestic workers: "The history of voluntary social insurance in other countries indicates definitely that only a very small proportion of all eligible individuals actually elect to participate. Moreover, the ones who do elect to participate are usually not those in the greatest need of such protection; that is, those of average or below average income."

Forty years ago, people expressing Mr. Silver's views were seen mostly wandering about Times Square wearing sandwich signs with slogans like: 'Abolish Slavery — Repeal Social Security.' At that time even U.S. News & World Report advised its readers to explain to their domestic employee that "her wage credits reported to Social Security are likely to be worth more to her later than any small amounts she may be 'saving' by dodging income taxes. . . ." The sea change in public attitudes that has conferred a patina of respectability on Mr. Silver's atavistic program of deregulation can be gauged by the statement made by the regional director of the Federal Security Agency in New

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1Annetta Dieckmann, "Domestic Workers Need Social Security," American Labor Legislative Review 31 (2):64-65 at 65 (June 1941).
York City in 1950 when domestic workers gained coverage under Social Security:

"It is not only the legal responsibility of all employers of domestics to comply with the new law, but also a social and moral obligation, because by not reporting they do a tremendous injustice to the individual domestic when that domestic becomes eligible for retirement. It also may cause an injustice to the survivors of domestics who are entitled to benefits and may be in great need." 19

Since Mr. Silver also asks for additional data on several points, they are supplied here. He asks, for example, whether the author has "researched the percentage of domestic workers who file a tax return jointly with a spousal wage earner, and who thus may fall into a meaningful tax bracket?" A special study of domestic workers conducted by the U.S. Bureau of Labor Statistics (BLS) sheds some particularly valuable light on the issue of the need for a compulsory Social Security system. In 1979, black women constituted 73 percent of all private household cleaners and servants.

More than 3 of 5 black women in private household work were between the ages of 45 and 64 years, and an additional 1 of 5 were over age 65. Most had been married at some point in their lives, but only about 40 percent of all black domestics were currently living with their husbands; and an additional 45 percent were widowed, divorced or separated.

Married black domestics were less likely than black female workers in general to have employed husbands. The husbands of fewer than 7 of 10 domestics were working. ... They were more apt to be laborers than the husbands of all employed black women. 10

Mr. Silver also believes that he has uncovered a contradiction in the article that supports his assertion that domestic workers are anything but victims: the author states on the one hand that the vast majority of domestic employers are scofflaws, who fail to report their employees' income to the government, and yet the author cavalierly asserts on the other that they are the lowest-paid group in the United States. If there is so little reporting, Mr. Silver wants to know, how can the data be representative? Alas, Mr. Silver can find no solace here either. The IRS is not the source of wage earning data. The primary source is the Current Population Survey (CPS) conducted by the Bureau of the Census and the Bureau of Labor Statistics. The CPS is a household survey that collects data from the workers, not their employers. The same BLS study already cited concluded that:

The earnings of private household workers are extremely low by any measure. Although most have been eligible for coverage by minimum wage provisions of the Fair Labor Standards Act since 1974, a large amount of noncompliance with the law is apparent. For instance, in 1974, of covered black household employees... 45 percent earned less than the $1.90 prescribed by law. ... In 1979... 7 of every 10 black domestics earned the minimum wage of $2.90 or less. Many domestics are living at the subsistence level. Almost 50 percent of the black women who maintained families and who reported private household work as the occupation at which they worked longest were below the poverty level in 1978. 11

This impression of the economic condition of domestic employees is confirmed by a different set of data — this time from the IRS Form 942s filed by employers, who as the minority of conscientious employers may be assumed to offer the best terms and conditions of employment. The Social Security Administration reported that in 1976: "The proportion aged 60 and over among domestic workers is more than four times as large as the proportion among all wage and salary workers — 31 percent compared with 7 percent." 12 Again, presumably these elderly women just got a kick out of cleaning Mr. Silver's house. Of those black women, to answer another of Mr. Silver's questions — namely, whether it is irrelevant whether domestic workers are covered by Social Security since they have other covered employment — 91 percent had covered wages only from domestic employment. 13

It is presumably these impoverished over-45-year-old black women, averaging 8.8 years of school, who terrorize Mr. Silver with their outrageous demands that he pay both shares of the FICA tax.

It is presumably these impoverished over-45-year-old black women, averaging 8.8 years of school, who terrorize Mr. Silver with their outrageous demands that he pay both shares of the FICA tax. Congress itself, interestingly enough, in fact encourages domestic employers to pay both shares out of their own pocket by excluding from FICA-taxable wages "the payment by an employer (without deduction from the remuneration of the employee)" of the employee's share of the tax. This provision is limited to the two groups of largely nonwhite low-paid employees who traditionally have been discriminatorily excluded from labor-protective legislation — household and agricultural workers. 15

13 "Domestic Workers Covered Under OASDHI," tab. 6 at 17.
Instead of acquiescing in his maids' extortionate demands, Mr. Silver had a duty to inform the IRS that they were seeking to conspire with him to commit a number of felonies proscribed by chapter 75 of the Internal Revenue Code. As even *U.S. News & World Report* could have advised him, if someone in Mr. Silver's situation wants to avoid "a jail sentence of up to five years . . . you have only two choices under the law — pay the tax on the maid's wages, or get a new maid." Perhaps enforcement agents of the IRS who read *Tax Notes* will take an interest in Mr. Silver's true confessions self-inculpatory admission. In any event, Mr. Silver also should have informed his (would-be) maids that they may have been multiply harming themselves since nonreporting not only deprived them of Social Security, disability, and unemployment benefits, but also of an earned income tax credit.

Mr. Silver's final claim is that since forcing middle-income earners to pay the full social wage to their domestic employees makes it impossible to hire them, the real losers are the workers who will become unemployed. By this logic, the entire edifice of labor standards should be demolished so that Mr. Silver can hire hundreds of personal servants at 10 cents an hour or whatever a labor market consisting of vulnerable workers deprived of any security will bear. Is this really the kind of society for which Mr. Silver yearns? Does he doubt that, if he paid domestic workers high wages, there would be no dearth of applicants more than willing to be paid on the books? The law of supply and demand that Mr. Silver fancies eternal is convenient for him as an employer because it is forged by the lopsided distribution of assets, which forces some to scar their knees to clean floors for a small fraction of the incomes of their employers, whose own contributions to societal welfare may be no greater.

Mr. Forman, instead of creating universal first-dollar Social Security coverage, would free both employees and employers of FICA tax liability for the first $4,000 of wages. He wants to implement this measure to relieve low-paid workers of an unfair tax burden. That reasoning underlay the enactment of the already existing earned income credit. But, Mr. Forman objects, workers have to wait until April 15 of the next year to receive the credit, whereas under his system they would receive the increment in every paycheck. Having recognized that very problem, Congress, as Mr. Forman well knows, entitled workers to advance payment of the credit from their employers. Since relatively few workers take advantage of that possibility, however, Mr. Forman's proposal offers a marginal gain beyond the current law.

Critics have been complaining for decades that employment taxes are regressive. Recycling the earned income credit program and financing it by increasing the FICA tax on earnings above $4,000, as Mr. Forman would do, however, is hardly a reform for which anyone would go to the barricades. Why making workers with incomes somewhat above $4,000 finance rich retirees' benefits and handing a tax break to all employers would represent progress remains Mr. Forman's secret. His disengagement from the real world of low-wage employment is reflected in his gratuitous and naive assertion that employers would generously return the FICA tax break to the employees as a gift in the form of higher wages. Mr. Forman blithely ignores the fact that during the past two decades, hundreds of thousands of employers in numerous industries have been engaged in a gigantic self-help project to implement his proposal: by pretending that their workers are nonemployees, they have avoided employment taxes — not to increase wages, but to lower them.

If Mr. Forman were really interested in progressive redistribution, he would instead urge abolition of the (absurdly low) ceiling on taxable earnings ($60,600) so that high-salaried employees could help finance the benefits of low-wage workers. More importantly, Mr. Forman should be proposing the abolition of the exemption of property income from Social Security taxation and the financing of benefits from general taxation paid for by a steeply progressive income tax. If someone as mainstream as a senior fellow at the Brookings Institution could support such proposals a quarter-century ago, surely Mr. Forman can muster the civil courage to do so today.

Finally and most bizarrely, Mr. Forman characterizes the raising of the FICA tax threshold for domestic workers as "a step in the right direction." Mr. Forman does not seem to understand that under the current system, only those who pay FICA taxes are entitled to Social Security benefits (regardless of the quantitative relationship between benefits and taxes). Moreover, the original article did not propose first-dollar coverage "so that domestic workers can pay more taxes"; indeed, vis-a-vis the (pre-Zoe Baird amendment) status quo ante, no increase in FICA taxes would have resulted at all. Mr. Forman's preoccupation with his hobbyhorse, the $4,000 exemption, appears to have blinded him to the whole point of the article to which he was ostensibly responding — namely, that raising the tax threshold for domestic workers will serve to

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9IRC section 3507.


11IRC section 3507.


14IRC section 3507.

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eject many of them from the Social Security system. In the absence of a prior step creating universal coverage for all workers, raising the threshold is a step in the wrong direction that does injure household employees.

Astonishingly, however, Mr. Forman joins right-wing free-marketeers in relegating those whom he has arrogantly banished from the Social Security system to the modern poor law system. The means-tested Supplemental Security Income (SSI) to which he directs the expellees is not only demeaning and insecure, but also offers appreciably lower payments than the Social Security old-age pensions to which a minimum wage worker is entitled. That a poverty advocate in the tax field can thoughtlessly welcome this result suggests that Mr. Forman has wound up advocating poverty rather than for poor people.

As a debater, Lincoln used to challenge apologists for slavery to explain why no one yet had voluntarily become a slave. So too here: not until Mr. Forman sets an example by voluntarily renouncing his own Social Security old-age and TIAA-CREF pensions in favor of SSI’s “safety net of monthly cash benefits,” to which he so glibly remits aged and disabled former house cleaners, can his proposal be taken seriously.

Sincerely,

Marc Linder
University of Iowa College of Law
Iowa City
January 30, 1995


Ninth Circuit’s Albertson’s Flip-Flop Outrages Practitioner

To the Editor:

I was pleased to see balanced coverage in your initial reporting of reaction to the Ninth Circuit’s reversal in Albertson’s (Tax Notes, Dec. 12, 1994, p. 1322). As indicated in my previous letter (Tax Notes, May 16, 1994, p. 913), I believe the taxpayer’s position is correct. The request for rehearing en banc should be granted. Failing that, I would hope that the U.S. Supreme Court accepts the panel’s virtual invitation for review.

It is disappointing that the participating Ninth Circuit judges were so evidently frightened by certain “commentators” and/or the IRS’s cavalier revenue loss “estimates.” The reversing decision, predicated only on the loftiest “policy” notions, transgresses any mainstream view of the role of the judiciary. The extreme approach taken implies little need for many specific provisions contained in the code, not least of which are the myriad rules enacted to explicitly address the treatment of interest both in the context of service relationships and otherwise.

Unfortunately, even the policy implications accepted by the panel are misinformed. The government’s assertion in its Brief on Rehearing that the panel’s original opinion “threatens the entire foundation of Congress’ elaborate $50 billion statutory design to induce employers to provide rank and file workers with secure retirement benefits” is either naive or arrogant. Likewise, its grandiose assertion that treating the amounts in question as interest “turns the world of pensions, profit sharing, stock bonus plans, deferred compensation, and other retirement arrangements upside down.” And finally, the scorched-earth threat that unless reversed the original opinion may cause the IRS to withdraw Revenue Ruling 60-31 and thereby “destroy the viability of deferred compensation arrangements.”

It is regrettable that the judges didn’t see things more clearly. An employer deduction for accrued interest will not cause nonqualified plans to be more attractive than qualified plans on either a pre- or posttax economic basis. In addition, ERISA effectively precludes the use of tax-deferred (unfunded) nonqualified plans for rank-and-file employees.

The government’s asserted revenue loss is similarly implausible. I have yet to find an economist or benefits expert who would estimate anything close to a $7 billion tax effect over five years, even assuming the IRS could not (as announced) categorically deny accounting method changes. From an interpretive viewpoint, even official published revenue estimates accompanying tax legislation are routinely accorded little weight by the courts. Ironically, in its section 162(k) litigation the IRS has argued strenuously for a “plain meaning” statutory interpretation and against ascribing relevance to revenue estimates.

Procedurally, it is troubling that a rehearing was granted at all since the government presented nothing new factually or legally. Substantively, the reversal cannot be said to interpret or apply anything evident in the operative law or its legislative history. To the contrary, the decision ignores both the language of the law and the economic reality that the amounts in question are interest. Such selectively spiritual tax jurisprudence should not go unaddressed.

It would be wise for the Ninth Circuit to reconsider the case and for the IRS to pursue proper legislative channels to obtain the outcome it seeks. If the rehearing en banc is denied, I believe Albertson’s is the rare corporate income tax case worthy of review by the Supreme Court even before a conflict is established among circuits.

Sincerely,

Edward J. Abahoonie
Partner
Coopers & Lybrand L.L.P.
New York, N.Y.
January 25, 1995

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