The Estate Planning Perils of 2010 and Beyond

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The year 2010 has been one of turmoil and confusing for many of those concerned with estate planning and taxes. Estate and tax planners have been facing the fiasco of the federal estate tax being repealed only for the year 2010. This would not be of such major concern if it was known what the future of the federal estate tax would entail, but it seems as if the situation is keeping everyone in a state of perpetual anxiety with no real idea of where it will go next.

The federal estate tax and the generation skipping tax are both repealed for the year 2010. However, analysis contained herein will focus mainly on the federal estate tax aspects of the 2010 repeal under the Economic Growth and Tax Relief Reconciliation Act. One must analyze several different issues to understand the overall issue created by the 2010 repeal of the federal estate tax and what the tax’s future may hold. The first issue is that of the modern federal estate tax. This encompasses the federal estate tax’s early and modern history, purpose, intent, constitutionality and what the most current federal estate tax law states and mandates. The next issue to be dealt with is that of the Economic Growth Tax Relief Reconciliation Act of 2001. This consists of the purpose, intent, history, and what the law set forth. The issue of there not being a federal estate tax for the year 2010 must be analyzed next. This includes the negative and positive affects on estate planning, the concept of carry-over basis, and the sunset provision of the Economic Growth Tax Relief Reconciliation Act. Furthermore, the inaction and attempted action of the United States Congress is of utmost importance to understanding the federal estate tax mess in 2010. This will include previous attempted congressional fixes and legislation and some reasoning behind why they failed. An analysis of the options available to congress
concerning the federal estate tax for 2011 and beyond. There are a variety of options that
congress could take and it will be noted on each one what the affects and byproducts of them will
be. An observation of what congress is likely to do and what congress should do moving forward
with federal estate tax policy is needed to conclude the problem of the uncertainty surrounding
the estate tax. This will include why congress will choose a particular route, the obstacles in its
path, and the reasoning behind why congress should act in a certain way.

Pre-history to the Modern Federal Estate Tax

A brief history of federal estate taxes in the United States is the first step in understanding
how congress is going to handle the future of the tax. Many of the earliest taxes were used for the
purpose of defense and military. The first federal estate tax, albeit in a simple form, was the
Stamp Act of 1797. Among various other stamps for certain transactions and documents, the act
placed a graduated system of tax stamps on bequests with the brackets consisting of $50 to $100,
$100 to $500, and every bequest over $500. It is important to note that the act exempted the
stamp tax for portions of estates going to widowed wives, children and grandchildren. The tax
was repealed five years later. The purpose of the Stamp Act of 1797 was to provide the means
to create a navy.

The Revenue Act of 1862 was enacted for the purpose of providing a stream of income to

3 Stamp Tax Act of 1797, 1 Stat. 527.
4 Id. at 528.
6 Jacobson, The Estate Tax at 119.
fight the War of Northern Aggression against the states then in rebellion. The act levied an
inheritance tax that was graduated from 0.75 percent to five percent, depending on the familial
relation of the beneficiary to the decedent, on all bequests above $1,000. It was an inheritance
tax because the tax was levied against every individual beneficiary and not on the estate as a
whole. The war ended and shortly thereafter in 1870 the act was repealed.

The prehistory to the modern federal estate tax was concluded with the War Revenue Act
of 1898. The United States needed to raise funds to fight the Spanish-American War, and the
main source of income, tariffs and real estate taxes, were not sufficient to satisfy this purpose.
The act placed a tax on the estate of a decedent with a graduated tax rate depending on the size of
the estate and determined further by the relationship of the beneficiary to the decedent with those
devises to beneficiaries most closely related receiving lesser rates and an exemption for
widows. The basic rates ranged from .75 percent to five percent based on the degree of
relationship of the beneficiary to the decedent. The brackets for the size of the total estate were
$10,000 to $25,000; $25,000 to $100,000; $100,000 to $500,000; $500,000 to $1 million; and $1
million and up. Every bracket after the first required a multiplier be applied to the tax rate with
the second bracket having a multiplier of 1.5, the third having one of 2, the fourth having one of
2.5, and the last bracket having a multiplier of 3. The tax was repealed by the War Revenue

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9 Dukeminier at 934.
10 Robbins at 2.
11 Jacobson at 120.
13 Id.
14 Id.
Repeal Act of 1902 when the war ended that same year.\(^{16}\)

The three above mentioned acts of congress were all precursors to what is now known as the modern federal estate tax. The concept of an “estate” tax is not foreign to the early history of the United States. The taxes levied on estates in early American history were for the most part in efforts to raise capital and funds to supply the military during times of crisis. Perhaps this is the reason these taxes were repealed shortly after the conflicts ended and were not looked at as a means to provide the federal government with a consistent stream of tax income. This is important to understanding the modern federal estate taxation schemes and the ultimate question of where congress will go next with the estate tax. A brief history of the modern estate tax should help bring into light the answer to the above question.

**History of the Modern Federal Estate Tax**

The history of the modern estate tax came into being during the early twentieth century with the outbreak of World War I.\(^{17}\) Congress passed the Revenue Act of 1916 in response to the worldwide conflict.\(^{18}\) The act laid out an estate tax rate table with a one percent rate on the first $50,000 and a maximum rate of ten percent on net estates valued over $5 million.\(^{19}\) This act marks the beginning of the modern estate tax because unlike all of the predecessor estate taxes, congress did not repeal this estate tax after the war ended.\(^{20}\) The maximum estate tax rate began rising and by the time President Roosevelt’s New Deal had been enacted and the United States entered World War II the maximum rate was set at a top rate of 77 percent, the highest the

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\(^{16}\) War Revenue Repeal Act of 1902, 32 Stat. 92, 97.

\(^{17}\) Jacobson at 120.

\(^{18}\) Id.

\(^{19}\) Id.

federal estate tax has ever been in United States history. Numerous amendments and acts affected the estate tax rates of modern times, however, only the ones most important to understanding the modern estate tax will be analyzed.

The Revenue Act of 1948 is an act that had great impact on the nature of the estate tax. Part II of Title III of said act provided a marital deduction in the “amount equal to the value of any interest in property which passes or has passed from the decedent to his surviving spouse, but only to the extent that such interest is included in determining the value of the gross estate.” The act goes on to state that the deduction is capped at 50 percent of the total value of the adjusted gross estate. The act did nothing to change the maximum rate of the estate tax, but this does not mean that the act was any less significant. The inclusion of a marital deduction was of utmost importance since the maximum rate at the time of the act was at a staggering 77 percent.

The Tax Reform Act of 1976 has been credited as “giving us the system we still have today.” This act combined the estate and gift taxing scheme in which one tax rate scheme was used for both estates and gifts as well as unifying the estate and gift tax credits into one. This is why the gift tax rate is equal to the maximum estate tax rate even though they are separated now (excluding the year 2010). All changes made to the modern federal estate tax to date have been modified from the law laid out in the Tax Reform Act of 1976. The act also created the

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20 Robbins at 2.
22 See Jacobson at 122.
24 Id. at 119.
26 Robbins at 3.
Several key changes to federal estate tax law were included in the Economic Recovery Tax Act of 1981. The first thing the act did for the estate tax was to increase the unified credit in a way that would push the filing requirements up to $600,000 over six years and thereby giving a $600,000 exemption. The maximum rate of estate tax was reduced from 70 percent to 50 percent. The act attempted to accomplish this by decreasing the maximum rate by five percent each year from 1982 to 1985, and the maximum rate would be at 50 percent for 1985. However, this reduction was hindered by legislation that soon followed the Economic Recovery Tax Act. Section 403 of the act went even further by granting an unlimited marital reduction with respect to both the estate tax and the gift tax.

The final piece of legislation worth mentioning in the estate tax’s history is the Taxpayer Relief Act of 1997. The act sought to gradually phase in a $1 million exclusion amount that would be allowable by the unified credit. The exclusion amount was to be phased in over a time spanning 1998 to 2006. The law also upheld a maximum tax rate of 55 percent. This was the last important act before the passing of the Economic Growth and Tax Relief Reconciliation Act of 2001.

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28 Id. at §2601, 1879.
29 See Economic Recovery Tax Act of 1981, Pub. L. No. 97-34, § 401, 95 Stat. 172, 299 (1981) (The act laid out the phase in of the increase of unified credit against the estate tax over the years 1982 through 1986. It also laid out the phase in of the increase for the filing requirement from $175,625 to $600,000 over the years 1982 to 1986. This effectively raised the exemption amount to $600,000 since filing was not required before that amount.)
31 Id.
32 Jacobson at 123.
35 Id.
36 Id.
Constitutionality and Purpose of the Modern Federal Estate Tax

The constitutionality and purpose of the federal estate tax must be examined before moving into an analysis of the Economic Growth and Tax Relief Reconciliation Act of 2001. The constitutionality of a federal estate tax was decided in 1921 by the Supreme Court in the case *New York Trust Company v. Eisner*. The executors in that case “had been required to pay and had paid inheritance and succession taxes to New York and other states…”37 The executors went on to allege that the Revenue Act of 1916 was unconstitutional as a direct tax not apportioned and demanded recovery of the estate taxes paid under said act.38 The executors also claimed that the federal estate tax interfered with the rights of the States and was also unconstitutional for that reason.39 The Court reasoned that “the United States has power to tax legacies, but it is said that this tax is cast upon a transfer while it is being effectuated by the State itself and therefore is an intrusion upon its processes, whereas a legacy tax is not imposed until the process is complete.”40 The Court went on to hold that the federal estate tax did not interfere with State processes since the federal estate tax fixes to the estate at the very beginning.41 It also held that the tax is attached before the estate assets are distributed and that for this reason the tax is on the right to transmit. Following this logic the court noted that the taxes were not on the beneficiaries individually but rather on the estate as a whole.42 A more simple way to put the outcome of the case is that the federal estate tax is constitutional in both respects because it is not

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38 *Id.* at 346, 348.
39 *Id.* (States had the right to regulate descent and distribution and this is generally held to be solely a State issue.)
40 *Id.* at 348.
41 *New York Trust Co.* at 349.
42 *Id.* at 349-50.
a direct tax requiring apportionment by the Constitution and that it does not interfere with the States’ rights in regulating the distribution of estates.

It is apparent that the purpose of the early estate taxes of the United States were developed to help raise funds for national security and defense from the analysis of the early acts concerning a federal estate tax. The purpose of the modern federal estate tax is perhaps a bit more murky than those earlier laws. It has been held by a federal court that “the purpose of the estate tax law was not to regulate the administration of probate estates, but rather to impose a tax on the right to transmit property at death.”43 This helps clarify the immediate purpose of the estate tax but does little to explain the overall policy purpose of the tax. Undoubtedly one overall purpose of the estate tax, as with all taxes, is to provide a revenue stream to the United States government very similar to the early estate taxes levied before the 20th Century. The difference being that the estate taxes of early American history were soon repealed after the conflicts or wars in which they were intended to raise funds for came to an end. Another commonly believed purpose of the federal estate tax is that it prevents accumulation of large family fortunes that effectively render heirs of those fortunes privileged solely by them being born into a wealthy family.44

The prevention of wealth accumulation purpose of the estate tax was championed best by President Franklin Delano Roosevelt in a message to Congress on June 19, 1935. President Roosevelt claimed that “the transmission from generation to generation of vast fortunes by will,

inheritance, or gift is not consistent with the ideals and sentiments of the American people.”  

This message from the President was to recommend to Congress “that in addition to the present estate taxes, there should be levied an inheritance, succession, and legacy tax in respect to all very large amounts received by any one legatee or beneficiary.”  

It is apparent that President Roosevelt was fervently against the accumulation of wealth by families which was most likely in reaction to Roosevelt’s need to provide funding for his New Deal policies that sought to bring the United States out of the Great Depression of the 1930s. President Roosevelt attacked the position that an additional inheritance tax would be a hindrance to economic growth by stating that “a tax upon inherited economic power is a tax upon static wealth, not upon the dynamic wealth which makes for the healthy diffusion of economic good” and that “creative enterprise is not stimulated by vast inheritances.”  

The position of President Roosevelt lends itself to the belief that those who inherit large fortunes virtually will do nothing to stimulate the economy. It is apparent that the idea of removing wealth from families with large fortunes is done because the federal government is believed to put those fortunes to better use than would the heirs of such fortunes. Roosevelt also believed that vast “accumulations of wealth cannot be justified on the basis of personal and family security,” and further that these accumulations contributed greatly to the concentration of power in those few individuals with large amounts of wealth over those many others who are not privileged with great wealth.  

These views instilled by President Roosevelt were by no means the first in reference to the purpose of the modern estate tax but are among the strongest for many believing that the purpose of the estate tax is to prevent

46 Id.
47 Id.
accumulation of wealth. There is certainly some truth behind this proposed purpose of the estate tax. The federal estate tax along with the gift tax have never made up more than ten percent of total revenue for the United States.\(^{49}\) It is also worth note that the percentage at which the two taxes make up of total revenue have historically been below four percent for most of the modern federal estate tax’s existence.\(^ {50}\) The fact of the matter is that the estate and gift tax combined make up a very small minority of the total revenues to the United States. The overall percentage of revenues brought in solely by the estate tax make up an even smaller minority of total revenues. This leads one to conclude that the revenue raising purpose of the estate tax is only secondary with the facts and evidence showing that the major purpose of the tax is to prevent accumulation of wealth within families thereby preventing a concentration of wealth in a small percentage of individuals. Essentially, the purpose of the modern federal estate tax is to combat wealth and income inequality throughout the United States.

**Modern Federal Estate Tax before EGTRRA**

The estate tax as it was before the enactment of the Economic Growth and Tax Relief Reconciliation Act of 2001 is contained within Title 26 of the Internal Revenue Code.\(^ {51}\) The Internal Revenue Code imposes a federal estate tax with a maximum rate of 55 percent on the excess of an estate amounting to over $2.5 million.\(^ {52}\) The code also provided an exclusion amount of $1 million.\(^ {53}\) This estate tax did not levy against most estates that filed for the year United States (June 19, 1935).

\(^{49}\) See Jacobson, *Figure G* at 125.

\(^{50}\) *Id.*


\(^{52}\) *Id.*

2001 with only slightly more than two percent of total estates for that year being taxed under these provisions.\textsuperscript{54} These numbers seem to be relatively low but that fact would not be enough to repel the tidal wave to the estate planning world known as the Economic Growth and Tax Relief Reconciliation Act of 2001. This piece of legislation brought about great changes to the modern federal estate tax and created massive confusion in the field as to what may happen to the estate tax next.

**The Economic Growth and Tax Relief Reconciliation Act of 2001**

The Economic Growth and Tax Relief Reconciliation Act of 2001 ("EGTRRA") brought about the most drastic changes to the modern estate tax since the tax’s inception over ninety years ago. It must be noted that EGTRRA provided for tax relief in many different ways other than through the estate tax hence the reason it is part of the so-called “Bush-Era Tax Cuts.” Some of these notable changes included the creation of new and lower income tax brackets, the doubling of the child tax credit, and the elimination of a penalty for married couples by allowing them to joint file to receive an increase in the standard deduction allowed to single filers on income tax returns.\textsuperscript{55}

The Economic Growth and Tax Relief Reconciliation Act brought about many changes to the modern estate tax. One major change was done in the form of amending the Internal Revenue Code to increase the exemption amounts provided to estates in which the decedent died after

\textsuperscript{54} See Jacobson, Figure F at 125. (The figure shows the taxable estate tax returns as a percentage of all adult deaths in the United States from 1916 to 2004.)

2002. The act essentially instituted a gradual increase in the amount of the unified credit over a period of years. It laid out a new exemption table which increased the year 2000 exemption level of $675,000 to $1 million for the years 2002 and 2003, $1.5 million for the years 2004 and 2005, $2 million for the years 2006, 2007 and 2008, and to $3.5 million for the year 2009. This meant that the federal estate tax for those decedent’s dying in the year 2009 would not be levied unless the estate reached the threshold of $3.5 million, at which the excess of that amount was to be taxed. There can be no doubt that this provision of EGTRRA was enacted so that the number of estates affected by the estate tax would be drastically reduced. The drastic difference in the amount of the exemption, $675,000 to $3.5 million, is indicative of this point.

The reduction of the estate and gift tax rates was another major amendment to the estate tax law enacted by EGTRRA. The act provided for an immediate reduction in the maximum rate of 55 percent down to 50 percent. This reduction was followed by a phase down of the maximum estate tax rate over the years spanning 2003 to 2007. The maximum rate was set at 49 percent for the year 2003 with a one percent decrease per year until 2007 with a maximum rate of 45 percent. The same 45 percent rate was also set to be the maximum rate for the years 2008 and 2009 as well. The law effectively brought the federal estate tax maximum rate down ten percent over eight years. The 45 percent figure is of importance because it acts a point of reference regarding the future of the federal estate tax.

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57 Id.
59 Id.
60 Id.
61 Id.
Section 501 of the Economic Growth and Tax Relief Reconciliation Act is perhaps the most important, monumental change to the federal estate tax. This section amended chapter 11 of the Internal Revenue Code by adding in a new section which asserted that chapter 11 “shall not apply to the estates of decedents dying after December 31, 2009.” 62 This repealed estate and generation-skipping transfer taxes for the year 2010. The year 2010 is very unique in that it is the first year in 95 years to not have an estate tax. There can be no doubt that this is a very drastic change in estate planning law since the practice had gone through nearly a century of planning with a federal estate tax. It is due to this drastic change and the next important section of EGTRRA that confusion and anxiety overwhelm estate planning and tax attorneys as of current.

The “sunset” provision of EGTRRA is a very important part of the act that ultimately left Congress in an awkward position concerning the federal estate tax. The provision provides that the “Act shall not apply... to estates of decedents dying, gifts made, or generation skipping transfers, after December 31, 2010.” 63 The provision effectively removes all of the changes that EGTRRA made to the federal estate tax beginning with the year 2011. It also makes the Internal Revenue Code of 1986 applicable to estates, gifts and transfers beginning in 2011 as if EGTRRA had not been enacted. 64 This makes for the situation in which the federal estate tax rates and exclusions will be set to revert back to 2001 levels of a 55 percent rate and a $1 million exclusion beginning with 2011 absent any congressional action beforehand. 65 It is because of this and the above amendments to the federal estate tax that has left one with the issue of what will Congress do with the federal estate tax from this point forward.

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62 Id. at 69.
64 Id.
The Effect of the Repeal on Estate Planning

One major effect of the repeal of the estate tax in 2010 is a problem concerning estate planning documents containing formulas that rely on the federal estate tax amount as a factor in the calculating of said formulas.66 Certain trusts are designed for the purpose of minimizing the federal estate tax consequences on the estate. Their purpose is usually accomplished by using some sort of formula which would inevitably contain a factor equal to the current amount of the federal estate tax. The absence of a federal estate tax for 2010 very well may lead the formula to an answer of zero and thereby unintentionally not devising to intended beneficiaries.67 Changes required to estate planning documents and trusts to help fix this problem cost money. There is also the chance that many of these changes will be deemed ineffective if Congress passes a new estate tax law for 2011. All of the documents modified considering the 2010 repeal very well may have to be modified again for 2011 if the repeal sunsets or Congress passes a new law. This is a major concern for those who may pass in 2010 with estate planning documents utilizing formulas that are not up to par with the current federal estate taxing scheme.

The formulaic problem described above is also illustrated by several individual states modifying their laws so as to account for the problem. Florida has amended its probate and trust codes to allow courts to use broad discretion by letting them consider the testator’s or settlor’s intent concerning probate.68 Absent the will or trust document explicitly providing for no federal

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67 Albert at 1.
68 Elaine Bucher et al, Florida Legislature Grants Courts Broad Power to Construe Wills and Trusts in the Absence
estate tax, the Florida statutes will apply to estates in 2010. Other states have taken another
route to combat the 2010 problem by construing wills and trusts as if the 2009 federal estate tax
is in affect, given that the will or trust uses a formula that considers the federal estate tax. These
states addressed the 2010 repeal in such a way so as to not robbed their citizens and residents of
what was intended when the federal estate tax was not considered in bequest formulas.

The 2010 repeal also provided for a unique problem concerning the basis for which a
beneficiary receives property from a decedent. The Internal Revenue Code provided that in 2009
the basis is the fair market value as of the date of death of the decedent. This is what is known
as the “step-up basis regime” concerning the capital gains a beneficiary would face if the
beneficiary sold the asset immediately after receiving it. Since the basis would be the fair
market value as of the date of death, an immediate sale of the asset by the beneficiary would not
result in any capital gain because the beneficiary had not seen an appreciation in the asset since
he received it. This method of determining the basis of an asset does not apply for 2010 and a
new method is put in place. The code provides for 2010 that the basis will be determined by
taking the lesser of the adjusted basis of the decedent or the fair market value as of the date of

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of a Federal Estate Tax, LexisNexis Martindale-Hubbell Legal Articles, Aug. 13, 2010 available at LEXIS
(discussing the state congressional action taken by Florida to prevent unintended consequences in will and trust
documents that use formulas that utilize the federal estate tax as a factor).
69 Id.
70 Id. (comparing Florida’s amended laws concerning problematic will and trust formulas using the federal estate tax
amount as a factor with those of Utah and Virginia. These two states construe such formulas as if the 2009 taxing
levels were in effect).
72 Nicole M. Vance, Estate of Confusion: Federal Estate Tax “Repeal” and Carryover Basis, 18 Nev. Lawyer 26,
27 (Sep. 2010) (discussing the changes in the basis rules from 2009 to 2010. The basis for 2009 was a step-up basis
while for 2010 it is a carryover basis).
73 Id.
74 26 U.S.C. § 1014(f) (2010) (effectively repealing the step-up basis rules by not having them apply after December
31, 2009).
death of the decedent. This means that if the decedent’s asset basis was less than the date of death value of the asset, meaning that the asset had appreciated in value since the decedent acquired such asset, then the beneficiaries basis will be that of the decedent’s asset basis. Carryover basis is how the method is termed and would certainly result in capital gains for the amount over the original basis for which the asset was sold. One can now see that even though there is not federal estate tax for 2010 beneficiaries can still incur tax liabilities if they sell inherited assets immediately after receiving them.

The most obvious, yet most important effect that the 2010 repeal of the estate tax is having on estates is the savings in taxes for those estates in which decedents die during 2010. A very prominent example of an estate that benefited greatly already this year is that of the late New York Yankee’s owner, George Steinbrenner. It has been reported that Steinbrenner’s estate will avoid close to $600 million in federal estate taxes in 2010 since the tax has been repealed. The federal government is not being able to collect on untold millions of dollars in tax revenue which in any other year they would have. With deaths of billionaires such as Steinbrenner, Dan Daniels and Walter Shorenstein all occurring in 2010 and not facing any federal estate taxes, beneficiaries of those estates are in order to take their inheritances for full value.

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76 Vance at 27.
77 Id.
79 Id.
80 Id. (noting that Houston energy magnate Dan Daniels and real estate developer Walter Shorenstein, both billionaires, also died in the year 2010).
The effects of the 2010 repeal are in no way limited to those listed above. The effects described give a basic understanding of some of the problems and benefits of EGTRRA’s 2010 provisions concerning the repeal of the federal estate tax. It is certain that many other problems regarding estates and the absence of the federal estate tax exist as the situation has created a mass of confusion for estate planning and tax attorneys all of which by no means can be discussed herein. The only thing to do now is to look at what Congress’s next move will be.

**Congressional Action (And Inaction) in Response to EGTRRA’s Sunset**

Many commentators and those involved in the legal community believed that Congress would act in 2009 or 2010 to prevent the sunset provision of EGTRRA from taking effect and thereby establishing for the year 2011 an exemption of only $1 million and a maximum rate of 55 percent, a drastic change from the 2009 which had an exemption of $3.5 million and a maximum rate of 45 percent.\(^\text{81}\) Far more estates will be getting taxed in 2011 than in previous years at a time when the economy is in decline and beneficiaries could use the resources provided by inheritance more than ever. An analysis and overview of proposed law in both houses of Congress from the years 2009 and 2010 is essential to be able to understand what the current (or incoming) Congress is likely to do to help alleviate the confusion surrounding the future of the federal estate tax.

The legislative overview will begin with the Certain Estate Tax Relief Act of 2009. The act was introduced to the House of Representatives on January 9, 2009 by Representative

\(^{81}\) See F. Ladson Boyle *et al.*, *Construing Wills and Trusts During the Estate Tax Hiatus in 2010*, 22 S. Car. Lawyer 35, 35 (Sep. 2010); and Jed C. Albert *et al.*, *The 2010 Federal Estate Tax “Repeal”*, LexisNexis Martindale-Hubbell Legal Articles (April 2, 2010) available at LEXIS (both articles claim in the first paragraph that Congress was expected to act to fix the problem and that the community was surprised when it did not).
Pomeroy of North Dakota. The bill proposed to retain the estate tax by not letting the 2010 repeal occur and gave an exclusion of estates up to $3.5 million. It would also freeze the maximum rate of estate tax at 45 percent which would have been up ten percent from 2009. The bill made it as far as the House Committee on Ways and Means but was never put to a vote.

The next piece of legislation came by way of the Senate from Senator Baucus of Montana on March 26, 2009. Senator Baucus’s Taxpayer Certainty and Relief Act of 2009 sought to set the estate exclusion rate at $3.5 million with a maximum tax rate of 45 percent. It also stipulated that “Section 901 of the Economic Growth and Tax Relief Act of 2001 shall not apply to title V” of the said act. This essentially meant that the sunset provision in EGTRRA would not apply to its provisions regarding the estate tax, nor would the provisions providing for a repeal of the estate tax in 2010, but rather the exclusion and rate amounts would be amended for 2010. Just as the bill previously reviewed, this bill did not make it to the Senate floor for a vote and only went as far as the Senate Committee on Finance.

Senator Carper of Delaware introduced legislation on November 17, 2009 which would have repealed the sunset provisions of EGTRRA and those provisions providing for the repeal of the federal estate tax for the year 2010. The bill would have once again tried to impose an

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83 Id. at §§ 2-3.
84 Id. at § 3.
86 S. 722, 111th Cong. § 301 (2009), 111 S. 722 (LEXIS).
87 Id.
89 S. 2784, 111th Cong. § 1 (2009), 111 S. 2784 (LEXIS).
exclusion amount of $3.5 million with a maximum tax rate of 45 percent.\textsuperscript{90} The amendments proposed by this bill essentially mirrored those of the Taxpayer Certainty and Relief Act of 2009 insofar as the federal estate tax was concerned but was narrowly focused to mainly estate tax issues unlike Senator Baucus’s bill which attempted to deal with other taxes.\textsuperscript{91} Senator Carper’s bill will suffer the same fate, however, and only go so far as to be referred to the Senate Committee on Finance.\textsuperscript{92}

Representative Pomeroy once again attempted to get legislation passed in the form of the Permanent Estate Tax Relief for Families, Farmers, and Small Businesses Act of 2009 on November 19, 2009.\textsuperscript{93} The difference was this time Representative Pomeroy got his bill passed in the House of Representatives in a 225 to 200 vote on December 3, 2009.\textsuperscript{94} The bill called for the sunset provision in EGTRRA not to apply and effectively eliminated the repealing of the estate tax in 2010.\textsuperscript{95} It also set the exclusion amount at $3.5 million and imposed a 45 percent rate to begin in 2010.\textsuperscript{96} Even though the bill passed the House of Representatives, the Senate never held a vote on it and the bill did not become law.\textsuperscript{97}

Another bill was proposed in the House of Representatives on December 2, 2009 offering drastically different terms than those offered by Representative Pomeroy’s bill. Representative Nye of Virginia introduced the Tax Relief for Business Growth and Sustainability Act of 2009 a

\textsuperscript{90} Id.
\textsuperscript{91} See S. 722, 111\textsuperscript{th} Cong. (2009), 111 S. 722 (LEXIS); See S. 2784, 111\textsuperscript{th} Cong. (2009), 111 S. 2784 (LEXIS).
\textsuperscript{92} 111 Bill Tracking S. 2784 (2009) (LEXIS).
\textsuperscript{93} H.R. 4154, 111\textsuperscript{th} Cong. (2009), 111 H.R. 4154 (LEXIS).
\textsuperscript{94} 111 Bill Tracking H.R. 4154 (2009) (LEXIS).
\textsuperscript{95} H.R. 4154, 111\textsuperscript{th} Cong. § 2 (2009), 111 H.R. 4154 (LEXIS).
\textsuperscript{96} Id. at § 3.
\textsuperscript{97} 111 Bill Tracking H.R. 4154 (2009) (LEXIS).
day before the vote was held on Pomeroy’s bill. The bill proposed that the sunset provision of
EGTRRA not apply in 2010 and that an exclusion amount of $5 million would be given to
estates before taxing and a maximum tax rate of 35 percent. It made its way to the House
Committee on Ways and Means but a vote was never held on it. It is apparent from the mere
proposal of this bill and a nay vote count of 200 on Pomeroy’s bill that many legislators within
the House of Representatives were not comfortable with a $3.5 million exclusion and a
maximum tax rate of 45 percent.

The summer of 2010 brought about a small flurry of proposed bills probably due to the
looming cloud of the November of 2010 elections hanging over the legislators’ heads. Senator
Sanders of Vermont proposed the Responsible Estate Tax Act on June 24, 2010. This bill
called for the familiar terms of a $3.5 million exclusion and a 45 percent tax rate on most estates
valued over $3.5 million. However, the bill did include a 50 percent tax rate on estates valued
over $10 million but below $50 million, with a ten percent surtax on any estate valued over $50
million. It seems as though the legislators were attempting to increase estate taxes on the super
wealthy while leaving lesser estates at a rate that could easily be accustomed to. The bill was
referred to the Senate Committee on Finance but has not seen a vote.

Representative Sanchez of California proposed the House complement of the Responsible

102 Id. at § 3.
Estate Tax Act on July 15, 2010.\textsuperscript{104} This bill’s proposals were identical to that of the Senate’s with a $3.5 million exclusion, 45 percent tax rates for estates valued at more than $3.5 million, 50 percent tax rates for estates valued over $10 million, and a ten percent surtax on all estates with a value of more than $50 million.\textsuperscript{105} The sunset provision of EGTRRA would not apply and the exclusion and rates would be amended as previously described.\textsuperscript{106} The House’s version of the Responsible Estate Tax Act met the same fate as its Senate counterpart by only being referred to the House Committee on Ways and Means.\textsuperscript{107}

The final piece of proposed legislation to be analyzed is Senator McConnell’s Tax Hike Prevention Act of 2010 he introduced on September 14, 2010.\textsuperscript{108} This bill sought to repeal the sunset provision of EGTRRA set to take place on the first of 2011 effectively avoiding the implementation of 2001 federal estate tax laws.\textsuperscript{109} It also intended to provide an exclusion for estates up to the amount of $5 million and a maximum federal estate tax rate of 35 percent.\textsuperscript{110} It should be noted that this bill also dealt with other federal taxes that are not related to the estate tax. The bill was introduced into the Senate but was not even referred to any committee upon such introduction and as such has not been held to a vote.\textsuperscript{111}

Politics have been involved very heavily with the federal estate tax over the past few years as with most issues dealt with in Congress. The November midterm elections have taken

\begin{itemize}
\item \textsuperscript{104} H.R. 5764, 111\textsuperscript{th} Cong. (2010), 111 H.R. 5764 (LEXIS).
\item \textsuperscript{105} H.R. 5764, 111\textsuperscript{th} Cong. § 2 (2010), 111 H.R. 5764 (LEXIS).
\item \textsuperscript{106} H.R. 5764, 111\textsuperscript{th} Cong. § 2 (2010), 111 H.R. 5764 (LEXIS).
\item \textsuperscript{107} 111 Bill Tracking H.R. 5764 (2010) (LEXIS).
\item \textsuperscript{108} S. 3773, 111\textsuperscript{th} Cong. (2010), 111 S. 3773 (LEXIS).
\item \textsuperscript{109} Id. at § 101.
\item \textsuperscript{110} Id. at § 302.
\item \textsuperscript{111} 111 Bill Tracking S. 3773 (2010) (LEXIS).
\end{itemize}
place as of recent and with them will be a wave of new congressmen who have much different views than those of the 111th Congress. It has been reported that the elections brought the numbers of those in the House and Senate who are likely to vote for complete repeal of the federal estate tax up to 245 and 49, respectively. There are still many things to consider when determining what Congress will or should do concerning the federal estate tax.

**Congressional Options From Here**

Congressional action addressing the federal estate tax situation is beginning to look more and more bleak as 2011 approaches. It is already late November 2010 and Congress has still failed to act to keep the federal estate tax from reverting back to the law as it stood in 2001 before the enactment of EGTRRA. The debate still goes on as one side of the aisle exclaims that a federal estate tax is needed so that the wealth pay their fair share while those on the other side of the aisle wants complete repeal of the federal estate tax because they view it as a tax on money that has already been taxed during the decedent’s lifetime. The November elections have taken place and Congress is becoming more and more anti-tax, including the federal estate tax. Complete repeal would be a very hard task since the Obama administration has been reported as wanting to use funds generated by the estate tax to help fund the healthcare overall and expanding insurance coverage. Either way, Congress has essentially four options regarding which direction to go in the future of the estate tax: do nothing and let the 2001 law take effect in

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114 Kim Dixon, *Obama Seeks Estate Tax Hike*, Reuters, May 11, 2009, http://www.reuters.com/article/idUSTRE54A3DL20090511 (discussing the Obama administration’s plan to close loop holes concerning deductions and the federal estate tax. The overall of healthcare has created a situation in which Obama needs to raise funds to pay for spending while keeping campaign promises of not raising middle class taxes. The estate tax is the likely candidate to achieve such an aim).
2011; institute a new law laying out rates and exemptions at more acceptable levels than the 2001 law; institute a new law that would retroactively apply the federal estate tax to the estates of those dying in 2010; or to repeal the federal estate tax permanently. Each of these options will now be analyzed.

The first option Congress could take is to do nothing and just allow the federal estate tax rates and exemptions revert back to 2001 levels. An exclusion amount of only $1 million and a 55 percent maximum rate would affect a lot more estates than the $3.5 million exclusion and 35 percent allowed in 2009. This path of action would be highly criticized because attaining an estate level of $1 million is not that hard to do and one does not have to be exceptionally wealthy to attain such a level. Therefore the federal estate tax would be affecting beneficiaries of estates that aren’t overly wealthy at a time when the economic climate of America is uncertain and many people could use inheritances to effectively pay down debts and other financial tribulations that the country is being faced with now. The other side of the coin is that allowing many more estates to be taxed could bring in revenue to the federal government at a time when the national debt is unusually high. This would be the easiest path for Congress to take as it requires it to do nothing.

The next option Congress could take would be to pass a law which laid out new rates and exclusion amounts not as restrictive as the 2001 law. This would require that both houses of congress come to terms within themselves and with each other. Allowing fewer estates to be taxed while still taxing exceptionally wealthy estates would allow the government to retain some income from estate taxes while allowing beneficiaries of smaller estates to take their inheritances
tax free so that they can be utilized during a time of economic turmoil. This would be difficult for Congress to achieve given the divisiveness that persists within both houses.

Another option Congress has is to pass a law that sets acceptable future rates and exclusions and also applies the estate tax retroactively to estates of those decedents passing in 2010. Enacting a law of this manner would certainly allow the government to recover lost revenues from 2010 due to the absence of a federal estate tax. One commentator has made the point that many ultra wealthy individuals have passed during 2010 and that the beneficiaries of those estates have enough money to fight any type of retroactive legislation Congress may try to pass.115

The final option Congress has is to completely repeal the federal estate tax indefinitely. The United States would lose all revenue attributed to federal estate taxes. This could potentially hurt the country as deficits soar and the economy has yet to rebound. No federal estate tax could mean that beneficiaries could use savings attributed to the absence of an estate tax for entrepreneurship reasons and other positive contributions to the economy.

Congress’s Likely Plan of Action

The fact that it is already late November and Congress has yet to come up with a plan for the federal estate tax for 2011, it appears that it is very likely that Congress will allow EGTRRA to sunset and the federal estate tax will be back in 2011 with a $1 million exemption and a rate of 55 percent as provided by the Internal Revenue Code of 1986.116 The 111th Congress is currently

a lame duck congress that will not be the same in 2011. Given the inability of the current Congress to come to an agreement as evidenced in the proposed legislation provided earlier and the fact that it is a lame duck congress, the likely option the current congress will ultimately take is to do nothing and leave the problem to be answered by the incoming congress in January of 2011. Therefore one must look to what Congress will do in early 2011.

One may be lead to believe that permanent repeal of the federal estate tax seems likely given the recent elections and the number of congressmen that support the repeal.\textsuperscript{117} This logic is flawed however because it ignores the totality of the circumstances surrounding the federal estate tax. The current administration’s policies simply will not allow for Congress to repeal the federal estate tax since the administration believes in raising funds to pay for costly legislation recently signed into law.\textsuperscript{118} Given this position is it fair to assume that President Obama would simply veto any legislation that comes across his desk seeking the permanent repeal of the federal estate tax. Though Congress may have enough members who support repeal of the estate tax, it is highly unlikely any such legislation will get passed under the current administration.

It has been suggested that the Obama administration wishes to have an estate tax rate somewhere in the range of 45 percent.\textsuperscript{119} Given this fact and the previous proposals for the federal estate tax, it is almost certain that a federal estate tax will exist in some form or another. The 112\textsuperscript{th} Congress will have to negotiate among themselves and with the administration to pass any law given many new members’ attitudes towards the estate tax. Retroactive legislation to

\textsuperscript{117} Sarji, \textit{Results of Midterm Elections}, November 10, 2010.

\textsuperscript{118} \textit{Id.}

apply the estate tax to 2010 has become very unlikely due to this shift in attitude in Congress towards the estate tax. This view is bolstered by the idea mentioned earlier that beneficiaries of large estates from 2010 will have the funds to battle any retroactive legislation. A new federal estate tax law will likely include an exemption amount ranging somewhere between $3.5 million and $5 million and a maximum tax rate in the range of 35 to 45 percent. This conclusion is reached because it would be a compromise between what the opposing sides want.

What Congress Should Do: The Conclusion

A Congressional committee in 2006 found that the federal estate tax reduces capital in the economy, hurt self-employment and family businesses, and that it is an impediment to moving up the social ladder and achieving wealth. It has also been observed that the federal estate tax has not provided for more than two percent of the total revenue for the United States since the 1970s. Provided these facts Congress should repeal the federal estate tax. The tax obviously serves no money raising purpose to the United States as it has recently only accounted for two percent of the total revenue. As shown earlier, all of the estate taxes of early American history were created for the purpose to raise revenue to provide for the United States during a time of crisis. Given the income tax and numerous other taxes that the federal government imposes, it cannot be said that revenues generated from a federal estate tax are necessary or vital to the overall condition of the United States. The whole concept of breaking up family fortunes and accumulations of wealth are inherently unfair, progressive reasons for the need of a federal estate tax. It is quite troubling that in a country where equality is touted as one of its most enduring

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121 Chairman on the Joint Economic Comm., 109th Cong., Costs and Consequences of the Federal Estate Tax (Comm. Print 2006) (analyzes studies and findings and comes to the conclusion that there is no compelling reason to keep the federal estate tax and numerous economic and equitable reasons for abolishing the estate tax).
attributes that the legislature and leaders of the same country seeks to discriminate on account of social standing. In conclusion, given the history of the estate tax, the negative effects it has on the economy and the discriminatory manner in which it is applied, the only logical option for Congress should be to repeal the federal estate tax in its entirety to insure that everyone in America is treated equally and to help recover the economy by taking out one factor that has been determined to be adverse to recovery.

122 See Jacobson, Figure G at 125.