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Dan Haar: Why the blue states' tax lawsuit will be a longshot

By Dan Haar

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All three of the tri-state governors threatening a lawsuit against the federal government are using military language to describe the newly forming legal dispute over whether the 2017 federal tax reform violates the U.S. Constitution.

That's not by happenstance. It's a turf war with a moral component, in some ways like the biggest human and states' rights battles in American history: slavery, segregation, gun control, abortion, voting rights, gay marriage, Obamacare, environmental regulation and even the federal income tax itself.

Can we actually compare the rule setting a \$10,000 limit on federal income tax deductions for state and local tax payments to, say, a state law limiting women's access to abortion clinics?

The answer is yes, according to Govs. Dannel P. Malloy, Andrew Cuomo, of New York, and the just-elected Phil Murphy, of New Jersey — all Democrats. To them, the tax bill represents the same sorts of federal encroachment against states' rights, and the same sorts of denial of citizens' equal treatment, that have led to violent uprisings in the past.

And thus, the military language. Cuomo calls the tax law, enacted exclusively by Republicans and signed by President Donald Trump, "an economic missile" aimed at a small handful of high-cost states that rely on state income taxes and local property taxes.

"It's headed your way. You have two options. Stand where you are or fight for your life," Cuomo said Friday after a joint conference call with Malloy and Murphy. "If we don't get out of the way of the missile...this changes the entire equation for the 12 states that are targeted."

"What is happening here is a frontal attack," Malloy said, citing \$10 billion in lost deductions in Connecticut alone.

"This is one battle in a broader war," Murphy said.

Like the broader war, this battle is a steep challenge for three states, which are also in discussions with California and Maryland to bring a lawsuit in federal court.

What we have here is a political battle looking for a legal argument — meaning it's not strictly about what written law says, but rather, the changing will of a very unwieldy nation. Republicans are already ridiculing the idea.

But all the big social-legal battles that tested the Constitution were, by definition, political.

One huge difference: Those landmark cases — *Brown v Board of Education*, *Roe v Wade*, *District of Columbia v Heller* on gun rights, for example — were about who gets to broaden or limit individual liberties (the states or the federal government); and which of those liberties the Constitution protects.

This tax battle, by contrast, is about whether the federal government is attacking whole states unfairly for political reasons.

Consider equal treatment, a key issue here. All taxpayers across the nation are treated equally under the new tax law. But vast numbers of those who are hurt by it live in a few states that all happen to have voted for Hillary Clinton over Trump in the 2016 election.

“How did they pick these 12 states?” Cuomo asked Friday. “Do you really think it's a coincidence?”

New ground

When this case is filed, it will talk about states, rather than people, having constitutional rights. That makes it a head-scratcher, just as the *Citizens United* case, giving corporations rights to free expression in political donations, created a conundrum.

“There are due process and equal protection issues as well as 16th Amendment issues that states can raise,” said Kevin B. Sullivan, Connecticut's tax commissioner, referring to the constitutional measure allowing the federal government to impose an income tax “without apportionment among the several states.”

But Sullivan said, “Whatever legal challenge we pose, it will probably be novel.”

For now, the three metro-area states, and the two other high-tax states, are working together to develop a case. It will happen fast and you can bet two of the hardest-headed lawyer-politicians in the country — Cuomo and Malloy — won’t back down.

Among the 12 hard-hit states, there is not one Republican in the U.S. Senate, and it was Senate Republicans who concocted the \$10,000 limit. Together, the hard-hit states account for more than 40 percent of the U.S. economy and a high percentage of the estimated \$60 billion a year the federal government will save by capping deductions on state and local taxes, known as SALT.

Cuomo snapped back at a New York journalist who suggested there is precedent for Washington, DC to limit federal income tax deductions derived SALT, in Supreme Court cases in the 1930s and again in the ’80s. It’s not about the legality of limiting deductions, he said. It’s about targeting political enemies.

“Discovery is key. In discovery, you’re going to seek emails,” Cuomo said. “All you need is one email. Now you have targeting for political reasons and now you’re off to the races.”

Tough case

Sounds simple, right? There might even be a public record of a Republican senator admitting the \$10,000 limit would target blue states.

It isn’t simple. Just getting to the point where a judge lets you look in your opponents’ shorts — discovery — is a years-long process. First of all, the federal government will argue the states “have no established precedent for a cause of action,” said Michael Koskoff, a Bridgeport lawyer and veteran of many politically charged cases, including the Black Panthers in New Haven in the ’70s.

“It’s not like you can just file a lawsuit and get to discovery,” said Koskoff, of Koskoff, Koskoff & Bieder.

He compares a possible federal tax case to the case before the state Supreme Court now, in which families in the Sandy Hook massacre are charging wrongdoing by the gunmaker, Remington, for targeted advertising. His son and law partner, Josh Koskoff, is the families' lead lawyer — and the big issue, years later, is whether the plaintiffs have a right to move forward with discovery.

“It is a cause of action that is plowing new ground,” Michael Koskoff said of both issues.

And new ground, by definition, is a political battle. That's why we're seeing Republicans such as Sen. Len Fasano, R-North Haven, the GOP senate leader, slamming Malloy over this multi-state tax case.

One political point: The dispute sheds light on the hypocrisy Republicans needed to show in order to pass a law that imposes a double tax. That is, a tax on earnings that has already been taxed. For decades, Republicans have decried corporate and estate taxes exactly because they tax income that's already been taxed.

Now we have a law that will drain billions of dollars, and over time, thousands of well paid residents, from states that all happen to lean the same way politically — robbing their ability to pay for basic services.

As a legal case, it's a longshot. But as Malloy said, “This is anathema to us as a nation.”