

DEATH AND TAXES: (OVER?)REACTION TO SECTION 1706 OF THE TAX REFORM ACT

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INTRODUCTION

“If you’re reading this, you’re no doubt asking yourself, ‘[w]hy did

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this have to happen?”¹ Indeed, many people across the country asked this very question after the events that took place on February 18, 2010. At approximately 9:40 that morning, after setting fire to his home in North Austin, Texas, a man climbed into his Piper Cherokee PA-28 aircraft at Georgetown Municipal Airport.² Just sixteen minutes later, that same plane crashed into an office building at 9430 Research Boulevard—seven miles from the state capitol.³ As the building burned and smoke plumed, details began to emerge. One person missing.⁴ Twelve injured.⁵ The smoldering building housed the local office of the Internal Revenue Service (IRS).⁶ There also surfaced a name: Andrew Joseph Stack III.

In the hours following the crash, those investigating the situation discovered an online posting signed by “Joe Stack.”⁷ It quickly became clear that the events of that day were no accident. Part suicide note and part manifesto, Stack’s online post railed against God and government, placing primary blame on the latter for devouring his savings and ruining his life.⁸ In particular, Stack cited a specific provision of federal tax law (Section 1706 of the Tax Reform Act of 1986), insisting that it had stripped him of his livelihood.⁹ Stack’s solution? The closing lines of his online posting not only answered that question, but also offered a disturbing explanation for the events of that day: “[w]ell, Mr. Big Brother IRS man, let’s try something different; take my pound of flesh and sleep well.”¹⁰ In his final act, Stack had boarded his single-engine plane and targeted the group that he perceived as his greatest maligners: the IRS.

In the days, weeks, and months following February 18, 2010, Stack’s actions produced a wide range of reaction. While his tactics drew everything from condemnation to commendation in the political realm, one of the more heated debates swirled around Stack’s harsh

1. Suicide note of Andrew Joseph Stack III, N.Y. TIMES (Feb. 18, 2010), <http://graphics8.nytimes.com/packages/pdf/us/20100218-stack-suicide-letter.pdf>.

2. Michael Brick, *Man With Grudge Against Tax System Crashes Plane Into Texas I.R.S. Office*, N.Y. TIMES, Feb. 19, 2010, at A14, available at <http://www.nytimes.com/2010/02/19/us/19crash.html>.

3. *Id.*

4. Michael Brick, *For Texas Pilot, Rage Simmered With Few Hints*, N.Y. TIMES, Feb. 20, 2010, at A1, available at <http://www.nytimes.com/2010/02/20/us/20crash.html>.

5. *Id.*

6. Brick, *supra* note 2.

7. Stack, *supra* note 1.

8. *See id.*

9. *See id.*

10. *Id.*

commentary on Section 1706.¹¹ Stack viewed that provision as the origin of his financial woes.¹² According to his colorful interpretation, Section 1706 declared him “a criminal and non-citizen slave,” stripping him of the freedom to decide how he would make a living.¹³ While most serious commentators provided a more muted framing of the situation than Stack himself, a surprising number of them agreed with Stack’s underlying premise that Section 1706 placed an unfair burden on people in his situation. Evoking images of a destroyed American dream and stifled technological creativity, critics of the section denounced Stack’s suicidal actions, but agreed with the proposition that “something had to give.” According to these commentators, the burden Section 1706 placed on a particular group far outweighed any perceived benefits. In their view, the “discrimination” against individuals in Stack’s position had to end.

Proponents of Section 1706 did not remain silent. Responding to those criticizing the law as unfair, several commentators defended the necessity of Section 1706; without it, tax avoidance by those similar to Stack would produce huge shortfalls in IRS collections as a result of exploitation. These advocates of Section 1706 viewed Stack’s opposition to the provision as a concomitant of pure self-interest. He objected to the law because it prevented him from cheating the tax system. In this way, supporters perceived Section 1706 as accomplishing its intended goal of foreclosing the attempts of people like Stack to circumvent paying their fair share of taxes. In short, the section served to prevent unfairness, not engender it.

In this note I will analyze the arguments for and against Section 1706. First, I will explain the fundamental differences between an independent contractor and an employee, as well as the confusion between the two that required Congress to act. Next, I will detail the enactment of Section 530 of the Revenue Act of 1978 and its effect on the problem of worker classification, explaining both the immediate aftermath and the long-term implications for workers. Then, I will discuss

11. One of the more indelicate instances of the political commendation appeared on Facebook. On that site, Syracuse conservative talk show host Jon Alvarez created a group praising Stack’s “sacrifice.” Facebook removed the tribute within hours, citing its ban on hateful and threatening posts. See Christina Boyle, *Facebook Pulls Plug on Tax-icide Tribute to Joseph Stack, Pilot Who Crashed Plane into Austin Office*, N.Y. DAILY NEWS (Feb. 20, 2010), http://articles.nydailynews.com/2010-02-20/news/27056807_1_plane-crash-irs-office-facebook; see also Dave Tobin, *Facebook Shuts Down Radio Host’s Homage to Suicide Pilot*, THE POST-STANDARD, Feb. 20, 2010, at A3, available at http://www.syracuse.com/news/index.ssf/2010/02/facebook_shuts_down_cny_radio.html.

12. See Stack, *supra* note 1.

13. *Id.*

the origin of Section 1706, detailing its impact on federal taxation and the technological community. Finally, I will turn to the heated debate that began in the aftermath of Stack's violent actions and determine whether, despite his methods, that angry taxpayer had a valid point. Given the combustible nature of the present national dialogue, it is important to know if people like Andrew Joseph Stack have some method underlying their madness.

I. I KNOW IT WHEN I SEE IT: INDEPENDENT CONTRACTOR V. EMPLOYEE

The provision Stack blamed for his financial woes—Section 1706—deals with a very specific tax issue related to the classification of workers. From Stack's viewpoint, that section prevented him from pursuing self-employment and subsequently penalized him when he attempted to go into business for himself.¹⁴ However, upon examination, Section 1706 does not operate as Stack perceived, but provides a guideline for a specific type of working relationship that supplements the tax provisions that preceded it. In order to appreciate how this interaction works, one must understand the general concepts of worker classification.

In effect, under the current tax scheme, there exist two classes into which a worker can fall for income and employment tax purposes: employee or independent contractor.¹⁵ When Congress enacted Section 1706, it affected how people in Stack's position classified themselves and, consequently, how they reported their taxes. However, before the particulars of Stack's situation can be discussed, one must understand the differences between the two worker classifications and why an individual might prefer to view himself as a member of one category or the other. The distinction not only carries with it tax implications for workers, but also tax and liability issues for employers.

A. *Who's the Boss?: Independent Contractors*

Independent contractors (sometimes referred to as the "self-employed") have a tax scheme separate from that of employees. In general, independent contractors pay Social Security and Medicare taxes under their own unique law: the Self-Employment Contributions Act (SECA).¹⁶ However, independent contractors do not need to pay any tax under the Federal Unemployment Tax Act (FUTA).¹⁷ In addition,

14. *See id.*

15. *See generally* I.R.C. §§ 1-1403 (2006).

16. *See id.* §§ 1401-1403.

17. *See id.* §§ 3301-3311. Because independent contractors do not need to pay FUTA

instead of having the withholding system that most people are familiar with, independent contractors must prepay their income tax liability for a given year through estimated taxes remitted each quarter.¹⁸ As an essentially voluntary reporting system, this provides less of a restraint on underreporting than the employee withholding system, favoring unscrupulous workers willing to violate the law.¹⁹

These workers also have significant flexibility in deducting business expenses from their income. In the present tax scheme, independent contractors may treat business expenses as a direct reduction in their reported income; they need not itemize each expense in order to receive a deduction.²⁰ Once again, the only restraint on claiming business expenses by independent contractors—excluding any issues of morality—is fear of an IRS audit and the possibility of penalties for reporting errors.

One should note that independent contractors also trigger tax implications for those who use their services (so-called “clients”). These clients must report almost all compensation paid to independent contractors on Form 1099.²¹ However, there exist three specific situations in which no reporting might take place.²² Because these situations do not require a client to report payments made to independent contractors, the contractor has an easier time of underreporting his or her income. In short, no paper trail would exist that would signal to the IRS that the contractor received income.²³

B. Working-Class Hero: Employees

In contrast to independent contractors, the taxation of employees adheres to a more regimented structure that has implications for both the employee and the employer. Perhaps the most important function of the

taxes, they generally are not eligible for any unemployment benefits. However, such a determination is often a matter of state law.

18. *Id.* §§ 6315, 6654. The dates for these installments are the 15th of April, June, September, and January.

19. DEP'T OF THE TREASURY, TAXATION OF TECHNICAL SERVICES PERSONNEL: SECTION 1706 OF THE TAX REFORM ACT OF 1986 13 (1991), *available at* <http://ia700307.us.archive.org/29/items/taxationoftechni01unit/taxationoftechni01unit.pdf>.

20. I.R.C. § 62(a)(1) (“The deductions allowed by this chapter . . . which are attributable to a trade or business carried on by the taxpayer, if such trade or business does not consist of the performance of services by the taxpayer as an employee.”).

21. *See generally id.* § 6051.

22. *See id.* § 6041. No form is required for payments made to a corporation, payments not made by a business (such as a homeowner paying a house painter), or payments to a worker that total less than \$600 in a single year; *see also* Treas. Reg. §§ 1.6041-1, -3 (1960).

23. *See* DEP'T OF THE TREASURY, *supra* note 19, at 13.

employer-employee relationship is federal withholding.²⁴ In the present system, an employer must withhold both federal income and Federal Insurance Contributions Act (FICA) taxes from an employee's salary.²⁵ Because the employer handles the taxes and assumes liability for not using the appropriate numbers for calculation, the worker has little flexibility in reporting his or her income.²⁶ In fact, the security provided by the withholding procedure allows employees to pay their income tax only once per year instead of the four times per year required of independent contractors.²⁷ As a result, "employee" status eliminates much of the freedom to underreport that an independent contractor enjoys.²⁸

In addition, employees also face greater difficulty in deducting business expenses from their income. Unlike independent contractors, for whom business expenses are generally deductible, an employee must itemize each expense in order to receive a tax deduction.²⁹ Thus, the Internal Revenue Code (the "Code") places a heavier burden on employees than the self-employed, requiring a degree of specificity not paralleled in the taxation of independent contractors.³⁰ The Code also imposes another, more general requirement on employees seeking a deduction: the itemized business expenses are usually deductible only to the extent that they exceed two percent of the employee's adjusted gross income from all sources.³¹ The net result of these restrictions is that an employee has less freedom to deduct business expenses than an independent contractor. However, it should be noted that, so long as the reporting is accurate, the total amount of taxes paid by employees does not differ significantly from that paid by independent contractors.³²

In addition to overseeing the taxation of an employee's wages, the employer also pays its own share of payroll taxes (including FUTA and

24. *See generally* I.R.C. §§ 3401-3406.

25. *Id.* §§ 3401, 3101-3102.

26. DEP'T OF THE TREASURY, *supra* note 19, at 13.

27. *Id.* at 67.

28. *Id.* at 13.

29. I.R.C. § 62(a).

30. *Id.* For the list of which expenses an employee must itemize, *see generally id.* §§ 161-199, 211-224.

31. *Id.* § 67.

32. DEP'T OF THE TREASURY, *supra* note 19, at 63. However, this similarity in tax rates was not always the case. Prior to 1983, independent contractors enjoyed significantly lower tax rates. Based on testimony, the Treasury recommended a neutralization of the rates in order to "relieve pressure on the question of employment status." *Id.* at 64 (citing *Hearing Before the Subcomm. on Oversight of the Internal Revenue Service of the Comm. on Finance*, 97th Cong. 91-114 (1982) (statement of John E. Chapoton, Assistant Secretary for Tax Policy)).

FICA).³³ As a result, the employer has certain expenses it must consider when using employees rather than independent contractors—expenses that the employer might reduce by using more independent contractors. Thus, it appears that employers might prefer to operate with more of these workers in order to curtail certain costs of doing business, such as the payment of unemployment insurance taxes and the administrative expenses associated with compliance.³⁴

C. *Who's Who?*

Having outlined the primary tax distinctions between independent contractors and employees, a more important consideration arises: under what circumstances does a worker fall into one category or the other?

According to the common law rules, the “right to control” informs the classification decision.³⁵ If the employer has the ability to control not only the ends but also the means with which a worker performs his or her function, that worker belongs in the “employee” classification.³⁶ One should note that it is the right to control—not the use of that right—which informs the decision.³⁷ On the other hand, “if an individual is subject to the control or direction of another merely as to the result to be accomplished by the work and not as to the means and methods for accomplishing the result, he is an independent contractor.”³⁸ To clarify the distinction between the two classifications, a Revenue Ruling contains a list of twenty common law factors that help determine employee status.³⁹ The IRS has further refined these twenty factors by

33. I.R.C. §§ 3111-3112, 3301.

34. DEP'T OF THE TREASURY, *supra* note 19, at 12-14.

35. Treas. Reg. § 31.3121(d)-(1)(c)(2) (as amended in 1980).

36. *Id.*

37. *Id.*

38. *Id.*

39. See Rev. Rul. 87-41, 1987-1 C.B. 296. The twenty factors appear as follows:

1. Must comply with employer's instruction about the work.
2. Receive training from or at the direction of the employer.
3. Provide services that are integrated into the business.
4. Provide services that must be rendered personally.
5. Hire, supervise, and pay assistants for the employer.
6. Having a continuing working relationship with an employer.
7. Must follow set hours of work.
8. Work full-time for an employer.
9. Do their work on the employer's premises.
10. Must do their work in a sequence set by the employer.
11. Must submit regular reports to the employer.
12. Receive payments of regular amounts at set intervals.
13. Receive payments for business and/or travelling expenses.

placing them into three general categories: (1) behavioral control; (2) financial control; and (3) relationship of the parties.⁴⁰ As a result of this multi-faceted approach, employers often made mistakes in classifying workers that resulted in the IRS imposing penalties and collecting interest for such misclassification.⁴¹

For example, an independent truck driver receives a request from a manufacturing company to make a delivery, accepts the assignment, and picks up the cargo with the understanding that the assignment must be completed within two days. In this situation, the truck driver has received direction as to *what* must be done, but he retains control over *how* he completes it. Thus, the truck driver would receive independent contractor status.⁴² In contrast, another truck driver reports to a manufacturing company every morning to receive his assignment. The company tells the driver what route to take and in which order to drop off each piece of cargo. Here, not only does the company control *what* the truck driver does, it also controls *how* he does it. As a result, the truck driver would be an employee.⁴³ In between these two clear illustrations lies the gray area of classification, where certain elements seem to suggest one relationship, while other factors would indicate another. Perhaps the manufacturing company provides the route, but does not control the order to the delivery. What if the truck driver reports to more than one company for his assignments? Moreover, how much weight should be given to each factor? It seems clear that the more complicated the nature of the working relationship, the more difficult it can be to properly classify a worker.

II. PEACE OF MIND: THE SAFE HARBOR OF SECTION 530

As illustrated, the decision to classify a worker as an employee or an independent contractor does not always lend itself to easy resolution. To help alleviate much of the anxiety surrounding the classification of

14. Rely on the employer to furnish tools and materials.

15. Lack a major investment in facilities used to perform the service.

16. Cannot make a profit or suffer a loss from their services.

17. Work for one employer at a time.

18. Do not offer their services to the general public.

19. Can be fired by the employer.

20. May quit work at any time without incurring liability.

40. INTERNAL REVENUE SERV., INDEPENDENT CONTRACTOR OR EMPLOYEE? TRAINING MATERIALS 2-7 (1996), available at <http://www.irs.gov/pub/irs-utl/emporind.pdf>.

41. DEP'T OF THE TREASURY, *supra* note 19, at 29 (generalizing based on IRS Annual Reports from 1971 to 1978).

42. INTERNAL REVENUE SERV., *supra* note 40, at 2-11.

43. *Id.*

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workers and the potential for penalties as a result of choosing wrong, Congress passed the Revenue Act of 1978.⁴⁴ In that Act, Congress included a provision (Section 530) that directly addressed the problem of worker classification.⁴⁵ Instead of using the twenty-part common law test for all situations, a safe harbor was granted.

A. Any Port in a Storm: How Section 530 Affected Worker Classification

In relevant part, Section 530 provides:

(1) IN GENERAL.—If—

(A) for purposes of employment taxes, the taxpayer did not treat an individual as an employee for any period . . . , and

(B) in the case of periods after December 31, 1978, all Federal tax returns (including information returns) required to be filed by the taxpayer with respect to such individual for such period are filed on a basis consistent with the taxpayer's treatment of such individual as not being an employee, then, for purposes of applying such taxes for such period with respect to the taxpayer, the individual shall be deemed not to be an employee unless the taxpayer had no reasonable basis for not treating such individual as an employee.⁴⁶

In effect, this language allowed employers who traditionally treated their workers as independent contractors to continue to do so without fear of receiving penalties for misclassification as long as the employer met three requirements.⁴⁷

First, the employer must have treated all similarly situated past and present workers as independent contractors rather than employees. According to the IRS Training Manual, “[a] substantially similar position exists if the job functions, duties, and responsibilities are substantially similar and the control and supervision of those duties and responsibilities are substantially similar.”⁴⁸ Second, the employer must properly report the worker, which involves “[the] timely filing of all required Forms 1099 with respect to the worker for the [returns] period, on a ba-

44. Revenue Act of 1978, Pub. L. No. 95-600, 92 Stat. 2763 (1978) (codified as amended at I.R.C. § 1); Harvey Shulman, Op-Ed., *Our Low-Tech Tax Code*, N.Y. TIMES, Feb. 21, 2010, at 8L, available at <http://www.nytimes.com/2010/02/21/opinion/21shulman.html>.

45. Revenue Act § 530, 92 Stat. at 2885 (codified as amended at I.R.C. § 3401).

46. *Id.*

47. WILLIAM HAYS WEISSMAN, NAT'L ASS'N OF TAX REPORTING AND PROF'L MGMT., SECTION 530: ITS HISTORY AND APPLICATION IN LIGHT OF THE FEDERAL DEFINITION OF THE EMPLOYER-EMPLOYEE RELATIONSHIP FOR FEDERAL TAX PURPOSES 6 (2009).

48. INTERNAL REVENUE SERV., *supra* note 40, at 1-9.

sis consistent with the business's treatment of the worker as not being an employee."⁴⁹ Finally, the employer must have a reasonable basis for classifying the worker as an independent contractor.⁵⁰ As a guiding principle for this requirement, Congress has made this clarification: "[g]enerally, [Section 530] grants relief if a taxpayer had any reasonable basis for treating workers as other than employees. The committee intends that this reasonable basis requirement be construed liberally in favor of taxpayers."⁵¹

In order to establish a reasonable basis, the IRS has emphasized reliance on three sources: past audits, judicial precedent, and industry practice.⁵² Past audits provide the easiest method of establishing a reasonable basis, allowing businesses to rely on past audits to support their classification of workers.⁵³ However, a business may not use the audit of a worker in the same way—it must be an audit of the business itself.⁵⁴ Reliance on judicial precedent may involve a number of things: published rulings, a technical advice memorandum, private letter ruling, or a determination letter pertaining to the business.⁵⁵ To show this reasonable basis, one must demonstrate reasonable reliance on the particular precedent, which requires a similarity of facts.⁵⁶

Finally, the most complicated yet commonly used of all reasonable bases is industry practice.⁵⁷ According to the IRS, the geographic scope of "industry" for the purposes of this determination extends only to those businesses located in the same area competing for the same customers.⁵⁸ However, if the business operates on a national scale, this could mean that "industry" includes all competitor businesses within the country.⁵⁹ In addition, the IRS will look to whether the practice is "longstanding"—a term often referring to a period of ten years, but it may be shorter depending on the facts and circumstances.⁶⁰ Lastly, the business must prove reliance on that industry practice, primarily evi-

49. *Id.* at 1-6.

50. *Id.* at 1-15.

51. H.R. REP. NO. 95-1748, at 5 (1978).

52. Revenue Act of 1978, Pub. L. No. 95-600, § 530(a)(2), 92 Stat. 2885-86 (1978); *see also* Rev. Proc. 85-18, 1985-1 C.B. 518.

53. INTERNAL REVENUE SERV., *supra* note 40, at 1-19.

54. *Id.* at 1-20. For a fuller discussion of the intricacies of using a past audit to establish a reasonable basis, *see id.* 1-19-1-22.

55. *Id.* at 1-24.

56. *Id.*

57. INTERNAL REVENUE SERV., *supra* note 40, at 1-26.

58. *Id.*

59. *Id.*

60. *Id.* at 1-27.

denced through business records.⁶¹ Demonstration of reliance on any one of these three sources—past audit, judicial precedent, or industry practice—will establish a “reasonable basis” for classifying a worker as an independent contractor. Thus, if an employer can demonstrate that it meets all three of Section 530’s requirements, the safe harbor will protect that employer from penalties for misclassification.

Beyond providing guidelines for classification and an explanation of how to qualify for the safe harbor, other language in Section 530 had additional implications. First, it prohibited the IRS from issuing regulations that address the status of workers as independent contractors or employees for tax purposes.⁶² Second, the law “terminated any retroactive employment tax liability for employers who had treated workers as independent contractors before January 1, 1980,” except in situations where the employer had no reasonable basis for doing so.⁶³ Thus, Congress passed Section 530 to reduce the anxiety of employers and workers by both providing stability in classification and eliminating the potential for penalties, except in instances of egregious misclassification.

B. Nobody Knows Anything: The Aftermath of Section 530

The immediate aftermath of Section 530 presented a period of uncertainty in classification. Although the IRS augmented the complex twenty-part common law test for classifying workers, the new approach still contained a subjective component that engendered confusion for employers and workers alike.⁶⁴ To make matters worse, because Congress had decided not to allow the IRS to issue regulations on Section 530 when the law passed in an effort to ensure consistency, the lack of guidance caused confusion among employers and workers who wanted clarification on how to determine the classification of a worker.⁶⁵

C. Members Only: Unequal Treatment Under Section 530

Perhaps the most acute effect of Section 530 was felt by businesses

61. *Id.* at 1-31.

62. Revenue Act of 1978, Pub. L. No. 95-600, § 530(b), 92 Stat. 2763 (1978) (codified as amended at I.R.C. § 3401).

63. STAFF OF THE JOINT COMM. ON TAXATION, 100TH CONG., 1ST SESS., GENERAL EXPLANATION OF THE TAX REFORM ACT OF 1986 1344 (Comm. Print 1987), available at <http://www.jct.gov/jcs-10-87.pdf>; MARIE B. MORRIS, CONG. RESEARCH SERV., 98-481 A, INDEPENDENT CONTRACTORS: REPEAL OF SECTION 1706 OF THE TAX REFORM ACT OF 1986 FOR TECHNICAL SERVICE WORKERS: S. 1924 2 (1998).

64. STAFF OF THE JOINT COMM. ON TAXATION at 1343.

65. *Id.* at 1343-44.

in the technology realm that interpreted the new law conservatively.⁶⁶ The problem centered on how aggressively technological companies thought the IRS would enforce Section 530. Under Section 530, employers who had a tradition of treating workers as part of a certain classification (primarily independent contractors) could rely on that history to continue treating those workers (and new ones similarly situated) as such.⁶⁷ In practice, this meant that technological brokerage firms (agencies who would connect workers with clients in need of technical services) that had existed for a sufficient period of time and that were willing to risk classifying workers as independent contractors could avoid paying into employee benefit programs and enjoy the tax advantages of maintaining fewer employees.⁶⁸ Certain workers would also benefit from this arrangement in that they could exploit the independent contractor status to avoid significant income taxation.⁶⁹ Thus, a tradition of classification allowed both the employer and worker to reap financial benefits so long as there existed some basis for treating the worker as an independent contractor (i.e. the arrangement was not so indicative of an employer-employee relationship as to provide no basis for that classification).

Conservative and start-up technological companies did not receive this same benefit-of-the-doubt protection. Because these brokerage firms did not consistently claim that their workers qualified as independent contractors, they could not point to a tradition of treating workers as members of that classification in the same manner that long-practicing firms could.⁷⁰ As a result, these businesses fell outside of Section 530's safe harbor and generally needed to treat those workers associated with the company as employees. In effect, this requirement forced the companies—fearing IRS imposition of penalties for misclassification—to pay higher employment taxes for the same relationship that longstanding companies treated as that of independent contractor.⁷¹ Moreover, due to the withholding system imposed on employees, unscrupulous workers could not make the same amount of money at a start-up business as they could by seeking employment at existing firms capable of claiming the use of “independent contractors.” These two drawbacks combined to make starting or maintaining a technological brokerage firm a less attractive possibility to those wary of IRS en-

66. *Id.* at 1344; *see also* DEP'T OF THE TREASURY, *supra* note 19, at 33.

67. Revenue Act § 530(b), 92 Stat. at 2885.

68. DEP'T OF THE TREASURY, *supra* note 19, at 33.

69. *Id.*

70. *Id.* at 32-33.

71. *Id.*

forcement. It became clear to lawmakers that, if this problem persisted, the unfairness would continue to grow, with those willing to cheat the apparent benefactors.

III. TECHNICALLY DIFFERENT: SECTION 1706

The solution seemed simple enough. In 1986, led by Democratic New York Senator Daniel Patrick Moynihan, Congress passed Section 1706 of the Tax Reform Act of 1986.⁷² However, the law's passage occurred under circumstances that aroused suspicion from some. In his proposal for an amendment to Section 530, Senator Moynihan packaged two issues that he felt needed resolution.⁷³ First, he presented an amendment to the Code that would allow multinational corporations to claim a credit for taxes paid in foreign countries—a move which would result in less revenue for the IRS.⁷⁴ Under the Gramm-Rudman-Hollings Act, any law which would cause a loss of revenue needed to be offset by an equivalent gain.⁷⁵ The provision coupled with the foreign tax credit to recover the lost revenue was Section 1706.⁷⁶

According to Senator Moynihan, reclassifying all technical service workers who found projects through brokerages and other third-party firms as employees would—over a several-year period—recoup the \$60 million loss absorbed by the government as a result of the foreign tax credit.⁷⁷ Also, the provision solved the very real problem of technical service workers exploiting the independent contractor classification to avoid paying income taxes.⁷⁸ While the latter of these justifications

72. Tax Reform Act of 1986, Pub. L. No. 99-514, § 1706, 100 Stat. 2085 (1986); see also Stack, *supra* note 1. In his online post, Stack offered his own colorful perspective on the creation of 1706:

Return to the early '80s, and here I was off to a terrifying start as a “wet-behind-the-ears” contract software engineer . . . and two years later, thanks to the fine backroom, midnight effort by the sleazy executives of Arthur Andersen (the very same folks who later brought us Enron and other such calamities) and an equally sleazy New York Senator (Patrick Moynihan), we saw the passage of 1986 tax reform act with its section 1706.

Id.

73. 132 CONG. REC. S8088-89 (daily ed. June 16, 1986) (statement of Sen. Patrick Moynihan).

74. *Id.*

75. Gramm-Rudman-Hollings Balanced Budget and Emergency Deficit Control Act of 1985, Pub. L. No. 99-177, § 201, 99 Stat. 1038, 1056 (1985).

76. 132 CONG. REC. S8088-89 (daily ed. June 16, 1986) (statement of Sen. Patrick Moynihan).

77. *Id.*; David Cay Johnston, *How a Tax Law Helps Insure a Scarcity of Programmers*, N.Y. TIMES, Apr. 27, 1998, at D1, available at <http://www.nytimes.com/1998/04/27/business/how-a-tax-law-helps-insure-a-scarcity-of-programmers.html>. See also STAFF ON THE JOINT COMM. ON TAX, *supra* note 63, at 1345.

78. STAFF OF THE JOINT COMM. ON TAXATION, 100TH CONG., 1ST SESS., GENERAL

served as the primary focus in the debate surrounding the legitimacy of Stack's arguments, both are necessary to understanding the underlying fairness of Section 1706.

A. Follow the Money: The Economics Behind Section 1706

One of the suspected justifications for passing Section 1706 came in the form of a business deal. In the 1980s, IBM began complaining about the cost of doing business overseas.⁷⁹ In order to keep growing, the company wanted a \$60 million tax break on this portion of its business, but first, IBM needed a congressional sponsor.⁸⁰ It found one in the form of Senator Moynihan.⁸¹ As noted above, under the budget rules in place at the time, new tax revenues had to pay for any tax breaks created.⁸² IBM and Senator Moynihan needed a solution.

According to a Joint Committee Report, the federal government could recoup the \$60 million by clarifying the guidelines for worker classification of software engineers and other technical professionals hired through brokerage firms.⁸³ As a result, many workers labeled by such firms as "independent contractors" would receive proper reclassification as "employees"—an alteration that would cause an increase in tax revenue.⁸⁴ This exception to Section 530's safe harbor would prevent these workers from cheating the tax system by forcing them and their employers to pay the required income and payroll taxes. Thus, the IRS and federal government could recover any loss in revenue it suffered as a result of giving IBM a tax break on its overseas business.⁸⁵ It seemed, for all intents and purposes, an even trade.

Whether Section 1706 resulted from some supposed backroom deal or came about purely through financial necessity mandated by the Gramm-Rudman-Hollings Act, raising revenue constituted the economic goal underlying its creation. Regardless of the true motivation, the law did address the very real problem of noncompliance within the tax system.

EXPLANATION OF THE TAX REFORM ACT OF 1986 1344 (Comm. Print 1987), available at <http://www.jct.gov/jcs-10-87.pdf>.

79. David Cay Johnston, *Tax Favors, IBM, and the Murder of Vernon Hunter*, THE HUFFINGTON POST (March 3, 2010, 3:33 PM), http://www.huffingtonpost.com/david-cay-johnston/tax-favors-ibm-and-the-mu_b_484418.html.

80. *Id.*

81. *Id.*

82. Gramm-Rudman-Hollings Balanced Budget and Emergency Deficit Control Act of 1985, Pub. L. No. 99-177, § 311, 99 Stat. 1038, 1056 (1985).

83. STAFF OF THE JOINT COMM. ON TAX at 1345.

84. *Id.*

85. Johnston, *supra* note 77.

B. Fixing a Hole: How Section 1706 Addresses Noncompliance

In addition to the financial incentives, Congress looked to tax-exploitative practices within the technological community to justify its passage of Section 1706. According to several studies done around the time of enactment, technical service workers classified as independent contractors consistently underreported earnings in an effort to avoiding paying higher income taxes.⁸⁶ The staff of the Joint Committee on Taxation described the situation as follows:

Congress was informed that many employers in the technical services industry that did not qualify for relief under section 530 nonetheless had claimed that their workers were independent contractors, despite the fact that such workers would be classified as employees under the common-law test. It is further contended that some of these employers were relying on erroneous interpretations of section 530, while others simply perceived that the IRS would not aggressively enforce employment tax issues.⁸⁷

Thus, even in situations where a technical service worker reported to a brokerage firm to receive his or her assignments and, but for the safe harbor of Section 530 of the Revenue Act, would more accurately be classified as an employee, such workers circumvented the more rigid taxation imposed on employees by taking advantage of the financial incentives built into the independent contractor classification.⁸⁸ So long as the technological brokerage firm could continue to demonstrate a tradition of treatment as an independent contractor, the IRS had little recourse to recover the income it would have received had the worker been properly classified as an employee. Section 530 provided a shield from those penalties formerly imposed for a misclassified worker.⁸⁹

Besides depriving the IRS of the opportunity to collect the accurate amount of tax, this practice also presented a problem with regard to employers. By misclassifying workers for an extended period of time and relying on the safe harbor provision of Section 530, technological employers not only avoided paying employee-related taxes, but they also shielded themselves from future liability by classifying based on a consistent pattern.⁹⁰ Thus, before the enactment of Section 1706, even if an IRS audit discovered a misclassification, Section 530 would prevent the

86. DEP'T OF THE TREASURY, *supra* note 19, at 47-55.

87. STAFF OF THE JOINT COMM. ON TAXATION at 1344.

88. DEP'T OF THE TREASURY, *supra* note 19, at 33.

89. Revenue Act of 1978, Pub. L. No. 95-600, § 530, 92 Stat. 2763, 2885 (1978) (codified as amended I.R.C. § 3401).

90. *Id.*; see also DEP'T OF THE TREASURY, *supra* note 19, at 32-33.

imposition of back taxes.

C. Textual Healing: The Language of and Reaction to Section 1706

The effect of Section 1706 was to amend Section 530 of the Revenue Act of 1978 by adding a new subsection (d). Titled “Treatment of Certain Technical Personnel,” the law added the following language to Section 530:

(d) EXCEPTION. – This section shall not apply in the case of an individual who pursuant to an arrangement between the taxpayer and another person, provides services for such other person as an engineer, designer, drafter, computer programmer, systems analyst, or other similarly skilled worker engaged in a similar line of work.⁹¹

The initial reaction to this language was confusion.⁹² Did Section 1706 force every technical service person into “employee” status? Could such a person ever be considered “self-employed”? Exactly what working relationships were covered under the new provision? Since the Tax Reform Act also lifted the restraint on the issuance of regulations by the IRS, these questions soon had answers.⁹³ Section 1706 applied exclusively to three-party situations; there had to be a worker, a brokerage firm who provided assignments to that worker, and a client who received the worker’s services.⁹⁴ However, even under those circumstances, Section 1706 did not *require* that a worker be classified as an employee—the employer needed to use the twenty-part common law test to determine the worker’s status.⁹⁵ Section 1706 just removed the safe harbor available under Section 530.

In the year immediately following the passage of Section 1706, not everyone was satisfied with the results that it produced—not even its sponsor, Senator Moynihan.⁹⁶ He went so far as to propose a bill repealing Section 1706, but it died before anything meaningful could occur.⁹⁷ During the subsequent eight years, Congress held six hearings

91. Tax Reform Act of 1986, Pub. L. No. 99-514, § 1706, 100 Stat. 2085, 2781 (1986) (codified as amended I.R.C. § 1).

92. DEP’T OF THE TREASURY, *supra* note 19, at 57.

93. *Id.* at 57-58; *see also* STAFF OF THE JOINT COMM. ON TAXATION, 100TH CONG., 1ST SESS., GENERAL EXPLANATION OF THE TAX REFORM ACT OF 1986 1345 (Comm. Print 1987), available at <http://www.jct.gov/jcs-10-87.pdf>.

94. DEP’T OF THE TREASURY, *supra* note 19, at 34.

95. *Id.*; *see also* STAFF OF THE JOINT COMM. ON TAXATION, *supra* note 63, at 1345.

96. David Cay Johnston, *Tax Law Was Cited in Software Engineer’s Suicide Note*, N.Y. TIMES, Feb. 18, 2010, at A17, available at <http://www.nytimes.com/2010/02/19/us/19tax.html>.

97. *Id.*

concerning the law.⁹⁸ Moreover, in 1996, the Joint Committee on Taxation prepared a tax revenue estimate which postulated that a repeal of Section 1706 would result in only an insignificant decrease in revenue.⁹⁹ Harvey J. Shulman went even further.¹⁰⁰ In his evaluation of the Joint Committee's findings, not only would a repeal of the law not result in a loss of revenue, it would actually produce an increase as technical service workers created successful businesses and their income swelled.¹⁰¹

IV. THOUGH THIS BE MADNESS, YET THERE IS METHOD IN'T: ARGUMENTS AGAINST 1706

Although no significant change occurred between 1986 and 2010, the issue caught fire once again after the events of February 18, 2010. In the wake of Joe Stack's plane crash, quite a few voices condemned his violent ends, but agreed with Stack's argument against Section 1706. These supporters included respected attorneys and even a Pulitzer-Prize winning journalist.¹⁰² Before sampling the critics of Section 1706, one must consider the comments that set the issue ablaze.

A. *Fire-Starter: The Ramblings of Joe Stack*

Throughout his career, Joe Stack worked as an engineer, first in

98. *Id.*

99. *Id.*

100. Mr. Shulman is former general counsel for the National Association of Computer Consultant Businesses (NACCB). According to its website, the NACCB came into existence because of Section 1706:

In response to concerns about various legislative initiatives that would have placed unfair burdens on the computer consultant industry, as well as restricted the flexibility of consultants and their clients to develop appropriate working arrangements, 11 computer brokers from various states attended a two-day meeting in January of 1987 to discuss organizing a national association to represent their industry.

About Us, TECHSERVE ALLIANCE, <http://www.techservealliance.org/about-techserve/techserve-history.cfm> (last visited Nov. 7, 2011). For a more complete overview of Mr. Shulman's relationship to the technical service community in his own words, see Interview with Harvey Shulman, Computer History Museum, in Mountain View, Cal. (Mar. 30, 2007), available at http://archive.computerhistory.org/resources/access/text/Oral_History/102658174.05.01.acc.pdf.

101. See Johnston, *supra* note 77 (quoting Mr. Shulman); see also DEP'T OF THE TREASURY, *supra* note 19, at 5.

102. See *supra* note 100 and accompanying text. In addition, David Cay Johnston received the 2001 Pulitzer Prize for Beat Reporting. *The 2001 Pulitzer Prize Winners, Beat Reporting*, THE PULITZER PRIZES, <http://www.pulitzer.org/citation/2001-Beat-Reporting> (last visited Nov. 7, 2011).

California and then in Austin, Texas.¹⁰³ As one of the professions that falls under the heading “technical personnel,” engineers who worked under a three-party arrangement became subject to Section 1706 upon its passage.¹⁰⁴ While Stack does not outline his particular employment situation, the foundation of his argument rests on his paranoid interpretation of the law and how it affected his life.¹⁰⁵ After presenting the text of Section 1706, Stack offers this comment:

[Y]ou need to read the treatment to understand what it is saying but it’s not very complicated. The bottom line is that they may as well have put my name right in the text of section (d). Moreover, they could only have been more blunt if they would have come out and directly declared me a criminal and non-citizen slave.¹⁰⁶

Stack argues that Congress designed Section 1706 specifically to derail the financial interests of technical service workers like him.¹⁰⁷ Viewing the provision as the product of underhanded corporate lobbying, he theorizes how the IRS used Section 1706 to impose taxes upon him during a period when he reported no income and had even dug into his own savings.¹⁰⁸ Perhaps the quote that best illustrates Stack’s conception of the situation is the suicide note’s closing line: “[t]he capitalist creed: [f]rom each according to his gullibility, to each according to his greed.”¹⁰⁹

B. The Second Coming: The Comments of Harvey Shulman

As one of the most vehement supporters of Stack’s argument against Section 1706, attorney Harvey Shulman wrote a piece for *The New York Times* criticizing the current tax-treatment of technical service workers. According to Mr. Shulman, the common law approach to determine whether a worker is an employee is “vague and unpredictable.”¹¹⁰ Thus, the emergence of Section 530’s safe harbor “provided

103. Stack, *supra* note 1.

104. Tax Reform Act of 1986, Pub. L. No. 99-514, § 1706, 100 Stat. 2085 (1986).

105. See Stack, *supra* note 1. Although Stack does not explicitly say so, he was the “worker” in the three-party arrangement. This conclusion is based on Stack’s reference to his efforts in combating Section 1706 being “derailed by a few moles from the brokers.” *Id.*

106. *Id.*

107. See *id.*

108. *Id.* While Stack offers little in terms of specifics, he claims to have cannibalized his savings in order to make ends meet during the year the IRS investigated him, including an IRA. Under the current Code, IRAs enjoy deferred income taxation in certain circumstances. If Stack removed the money from his IRA, this deferred taxation would likely end and he would have income.

109. Stack, *supra* note 1.

110. Shulman, Op-Ed., *supra* note 44.

commonsense relief from potentially devastating I.R.S. audits to companies that operated reasonably, consistently and in good faith.”¹¹¹ For technical service workers, this safe harbor allowed them to expand their business and operate with independence.¹¹²

Then came Section 1706. In Mr. Shulman’s opinion, this law dramatically altered the landscape of technological services: “[t]ens of thousands of technology professionals who had formed their own one-person consulting businesses could no longer find work unless they agreed to abandon their enterprises and become payroll employees.”¹¹³ He emphasizes that many of these workers simply did not want to be employees, responding to broker/employer attempts at reclassification by quitting—a move which engendered distrust among clients already wary of using independent contractors due to Section 1706.¹¹⁴ Moreover, Mr. Shulman mentions that the law resulted in instances of what he describes as “almost” double-taxation: the worker would pay taxes as an independent contractor, the IRS would classify the worker as an employee, and then the broker-deemed-employer would have to pay more taxes to the IRS.¹¹⁵ In short, Mr. Shulman argues that Section 1706 is a discriminatory and harmful law that stifles technological creativity.¹¹⁶

Mr. Shulman also attacks the justifications used to pass the section in the first place, stating that a Treasury Department study has undermined the perception that technical service workers underreport any more than other self-employed workers.¹¹⁷ In fact, according to an interview Mr. Shulman gave, his work in lobbying against Section 1706 has led him to believe that the law actually results in a loss of revenue for the IRS.¹¹⁸ In supporting this position, he suggests that “employee” status allows a worker to shelter more income from taxation than “inde-

111. *Id.*

112. *Id.*

113. *Id.*

114. Interview with Harvey Shulman, *supra* note 100. *But see* DEP’T OF THE TREASURY, *supra* note 19, at 63.

115. Interview with Harvey Shulman, *supra* note 100. Although it is unclear exactly what Mr. Shulman means by instances of “collecting the taxes not quite twice but almost twice,” it is true that a newly-classified employer would have to pay employment taxes—plus the penalties for misclassification and failing to withhold—on account of actually being an employer.

116. Shulman, Op-Ed., *supra* note 44.

117. *Id.* *But see generally* DEP’T OF THE TREASURY, *supra* note 19. While this Treasury study acknowledges that technical service workers do not underreport to a significantly greater degree than other workers, it *does* show that technical service workers underreport. That other workers might be equally culpable does not excuse the noncompliance of technical workers.

118. Interview with Harvey Shulman, *supra* note 100.

pendent contractor” status.¹¹⁹ Thus, in Mr. Shulman’s opinion, the law actually hurts the IRS’s ability to collect revenue from workers.

C. Big Brother is Watching You: The Views of David Cay Johnston

In addition to Shulman, Stack’s argument found another strong and well-respected advocate in the form of Professor David Cay Johnston. In fact, Professor Johnston was an outspoken critic of Section 1706 for more than ten years prior to Stack’s violent act. In a 1995 *New York Times* article, he calls the laws relating to worker classification “the most contentious employment tax issue in the nation.”¹²⁰ Professor Johnston spends much of the article considering individual cases and concludes that the current tax system engenders a lot of confusion about worker classification—confusion that may have significant financial consequences for those involved.¹²¹

A few years later, Professor Johnston wrote an article that once again tackled the issue of classification, but this time he focused exclusively on the problem within the technological community.¹²² In this article, he refers to Section 1706 as “a long-standing tax law that is pointed specifically at software professionals and prevents many of them from setting up freelance businesses.”¹²³ Similarly, he argues that by passing that law, “Congress decreed that most individual programmers cannot be entrepreneurs.”¹²⁴ The main portion of the article builds upon this point, providing a number of cases where the confusion surrounding Section 1706 has hindered particular business endeavors or crippled individuals’ finances.¹²⁵ This approach creates an impression similar to the one found in Professor Johnston’s 1995 article: technological creativity stifled by the rigidity of the tax system. Importantly, Professor Johnston does not argue that tax cheating among technical service workers is nonexistent; if anything, he concedes the point.¹²⁶ Instead, he frames the issue as an economic one, using a quote from Mr. Shulman: “[b]asically the I.R.S. is saying it would rather collect less

119. *Id.*

120. David Cay Johnston, *Earning It: Are You Your Own Boss? Only if the I.R.S. Says So*, N.Y. TIMES, Mar. 19, 1995, at 3, available at <http://www.nytimes.com/1995/03/19/business/earning-it-are-you-your-own-boss-only-if-the-irs-says-so.html>.

121. *Id.*

122. Johnston, *supra* note 77.

123. *Id.*

124. *Id.*

125. *Id.*

126. *Id.*

revenue with less cheating than collect more revenue with more cheating. Does that make economic sense?”¹²⁷

In the days following Stack’s act of violence, Professor Johnston once again wrote a piece for *The New York Times* discussing Section 1706.¹²⁸ As he did in his two previous iterations, Professor Johnston emphasized the adverse impact the section has on the technological community.¹²⁹ However, given its proximity to Stack’s mad flight, the article possessed a gravity and immediacy that suggested the need for real change. Perhaps Professor Johnston’s closing words most accurately illustrate the problem as he understands it: “[o]n Wednesday, a day before Andrew Joseph Stack III left his suicide note and crashed the plane into the building in Austin, the Obama administration proposed a widespread crackdown on all types of independent contractors in an effort to raise \$7 billion in tax revenue over [ten] years.”¹³⁰

Another article by Professor Johnston’ on the matter appeared in *The Huffington Post* on March 3, 2010.¹³¹ In this article, he lent credence to Stack’s arguments by describing the negative affect Section 1706 had on the technological community: “Congress took away some economic liberties from software programmers and the like, as Stack asserted in his suicide manifesto.”¹³² Professor Johnston writes at length about how the section prevents technical services workers from pursuing the American dream and rewards greedy corporations.¹³³ He even goes so far to suggest an alternative to the present tax system— withholding for those “independent contractors” who work for brokerage firms.¹³⁴ Based on all of these statements, it seems clear that Professor Johnston views Section 1706 as a hindrance to the fair taxation of technical service workers that limits their economic freedom.

127. Johnston, *supra* note 120.

128. David Cay Johnston, *Tax Law Was Cited in Software Engineer’s Suicide Note*, N.Y. TIMES, Feb. 18, 2010, at A17, available at <http://www.nytimes.com/2010/02/19/us/19tax.html>.

129. *Id.*

130. *Id.*

131. Johnston, *supra* note 79.

132. *Id.*

133. *Id.* Professor Johnston writes a considerable amount about the role IBM played in passing Section 1706. However, as mentioned above, little factual evidence exists to support this conclusion. Certainly the section came into law without debate and had to comply with the Gramm-Rudman-Hollings Act, but this does not necessitate a “backroom deal” between Congress and IBM.

134. *Id.*

V. DOESN'T STACK UP: THE NECESSITY OF SECTION 1706

Not content to watch the critics of Section 1706 eviscerate the tax law without contest, proponents of the section offered a number of reasoned defenses to why the United States needs such a provision in the tax system or, more specifically, why its presence has little impact on honest workers. As discussed above, under the current version of the Code, there is little taxation difference between employees and independent contractors who fully comply with the requirements of the Code.¹³⁵ The main difference between the two categories is the ease with which each can cheat; independent contractors have considerably more freedom in reporting income and obtaining deductions.¹³⁶

The contention that Section 1706 deprives technical services workers of the opportunity to pursue self-employment has little foundation. Under the language of the law and the IRS regulations issued, Section 1706 applies exclusively to three-party relationships; nothing prevents a technical service worker from starting his own business and dealing directly with a client.¹³⁷ It is only when that worker receives his assignments through a brokerage firm that an employer-employee relationship may exist.¹³⁸ But even under those circumstances, the IRS will use the twenty-factor common law test before making any determination.¹³⁹ Thus, Section 1706 does not prevent technical service workers from starting business—it prevents them from *pretending* to do that when the law would more accurately classify them as employees. In contrast to what the critics suggest, nothing in the law has the effect of stifling creative entrepreneurs who wish to start their own company and build a client base. These innovators must simply refrain from becoming so entwined with a technical brokerage firm that the firm would appear to control the worker under the twenty-part common law test.¹⁴⁰

As Mr. Shulman has suggested, the evidence indicates that technical service workers do not cheat on their taxes to a greater degree than other independent contractors.¹⁴¹ However, the fact that “everyone’s doing it” does not mean that enforcing compliance against a particular group of people—in this case, technical service workers—constitutes an

135. DEP’T OF THE TREASURY, *supra* note 19, at 63.

136. *See id.* at 13.

137. *Id.* at 34.

138. *See* STAFF OF THE JOINT COMM. ON TAXATION, 100TH CONG., 1ST SESS., GENERAL EXPLANATION OF THE TAX REFORM ACT OF 1986 1343-45 (Comm. Print 1987), available at <http://www.jct.gov/jcs-10-87.pdf>.

139. *Id.* at 1345; *see also* DEP’T OF THE TREASURY, *supra* note 19, at 34.

140. Rev. Rul. 87-41, 1987-1 C.B. 296.

141. DEP’T OF THE TREASURY, *supra* note 19, at 48.

unfairness to those workers. The goal of Section 1706 is the prevention of tax cheating by a group whom the government has identified as non-compliant through the use of a law addressing a specific, three-party practice prevalent among that particular group.¹⁴² Section 1706 does not independently create liability for technical service workers—it creates an exception to the safe harbor provided by Section 530, restoring the common law test for classification.¹⁴³ Rather than engendering unfairness, this restoration reflects the reality of the situation and serves to impose the most appropriate taxation on these individuals.¹⁴⁴

CONCLUSION

Regardless of political affiliation or perception of the tax law, few people will argue that Joe Stack had a good reason to crash his plane into the IRS building in Austin, Texas. But however warped and twisted his final act may have been, a meaningful debate does surround his evaluation of the Code's treatment of independent contractors and employees. The decision of which side has the more powerful argument depends on perspective.

From a purely economic standpoint (i.e., what tax scheme would result in highest total collections), the opponents of Section 1706 may have a valid point: no concrete evidence exists to suggest that technical service employees cheat on their tax returns anymore than other independent contractors. However, that argument is too easy. The “everyone does it” attitude is precisely the excuse society laments in young and impressionable individuals. Critics have also suggested that Section 1706 stifles technological creativity and prevents honest, hard-working Americans from using their talents. But this rings false. The section prevents technical service workers from using brokerage firms to find placement; it applies exclusively to three-party situations. Nothing in Section 1706 prevents these individuals from creating their own company. To suggest otherwise is to misunderstand how the tax law operates.

It is the defenders of Section 1706 who have the proper perspec-

142. STAFF OF THE JOINT COMM. ON TAXATION at 1344-45.

143. See Rev. Rul. 87-41, 1987-1 C.B. 296.

144. On Wednesday, February 17, 2010—one day before Stack's fateful flight—the Obama administration announced its plan for widespread enforcement of the independent contractor classification, hoping to raise \$7 billion over a ten-year period by making sure that workers do not misclassify themselves in order to escape paying the appropriate amount of tax. Steven Greenhouse, *U.S. Cracks Down on 'Contractors' as a Tax Dodge*, N.Y. TIMES (Feb. 17, 2010), <http://www.nytimes.com/2010/02/18/business/18workers.html>.

tive. The fact that technical service workers appear no more likely to cheat the tax system than other independent contractors does not excuse their cheating. Section 1706 seeks to discover the reality of the working relationship and tax it accordingly. In the technical service world, the function of brokerage firms to facilitate the use of workers by third parties may or may not have strong similarities to an employer-employee relationship. Section 530 allowed that practice to continue without fear of repercussion in all but the most egregious situations. Certainly the predictability provided by Section 530 has its merits. But to allow the law to protect those parties from liability because of a tradition of misclassification and cheating does not adequately reflect the American tax system. Section 1706 does not punish the entrepreneur and self-employed through over-taxation. It punishes those individuals who want the “independent contractor” status to cheat the system. The Code may be complex, almost to the point of un-readability in parts, but its ultimate goal is to discover reality. Section 1706 merely peels back one layer of the veil covering that reality.

Perhaps even more important than determining who has the more persuasive argument is the existence of the debate itself. In a world continually trending toward greater and greater political polarization, the ability to discuss the situation and discover solutions to complex issues has become of paramount importance. Andrew Joseph Stack III offers the chilling alternative: “[s]adly, though I spent my entire life trying to believe it wasn’t so, but violence not only is the answer, it is the only answer.”¹⁴⁵ Reasonable minds may disagree as to whether Section 1706 has a positive or negative impact on this country. They may not, however, disagree about whether violence is the answer.

145. Stack, *supra* note 1.