

September 1994

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Dawn Erlandson

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Recommended Citation

Dawn Erlandson, *The BTU Tax Experience: What Happened and Why It Happened*, 12 Pace Env'tl. L. Rev. 173 (1994)

Available at: <https://digitalcommons.pace.edu/pelr/vol12/iss1/9>

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The Btu Tax Experience: What Happened and Why it Happened

DAWN ERLANDSON*

I. Introduction

President Bill Clinton, in his State of the Union Address on February 17, 1993, proposed a "broad-based energy tax as the best way to provide [us with] revenue to lower the deficit, because [the tax] also combats pollution, promotes energy efficiency, and promotes the independence economically of the country, as well as helping to reduce the debt."¹

The mere proposal of the Btu tax by the President was a victory for advocates of pollution taxes. The tax's defeat did not reveal shortcomings in the Btu² tax per se or in pollution taxes in general, but rather it revealed the political animosity in Washington towards pollution taxes. Although advocates were able to persuade the Clinton Administration to propose a broad-based energy tax, they lacked the political capital and resources to pass the tax through Congress.

* Dawn Erlandson is with Friends of the Earth

1. President Bill Clinton, The State of the Union Address (Feb. 17, 1993), in *The State of the Union: President Clinton's Address*, WASH. POST, Feb. 18, 1993, at A24.

2. "By definition, one Btu, or British Thermal Unit, is the quantity of heat required to raise the temperature of one pound of water from 63 degrees Fahrenheit to 64 degrees Fahrenheit." FRANCIS W. SEARS ET AL., UNIVERSITY PHYSICS 359 (7th ed. 1987).

II. Years of Advocacy Pay Off: A Broad-based Energy Tax Proposed

Due in large part to Vice President Gore's efforts and endorsement, the Btu tax became a major component of the Administration's deficit reduction package.³ Vice President Gore's support, coupled with a number of additional factors, set the stage for the acceptance of a broad-based energy tax by the Clinton Administration.

First, composition of the President's \$500 billion deficit reduction plan had to include a combination of spending cuts and tax increases.⁴ The Administration's preferred tax increase, a hike in the income tax rates paid by the wealthy, did not raise sufficient revenue. The only major sources of revenue were a broad-based consumption tax and a broad-based energy tax. The Administration chose the energy tax.⁵

Second, the many years of advocacy and study by environmentalists and like-minded economists had paid off. Power brokers like Vice President Gore and editorial writers were persuaded that a tax on energy would do double duty by raising revenue and fighting pollution.⁶ Third, taxes would be imposed on bad activities, like pollution, rather than on good activities like work and investment. Surprisingly, this concept also found favor with a significant group of chief executive officers who pledged their support for the broad-based energy tax.⁷

3. See generally, SEN. AL GORE, *EARTH IN BALANCE: ECOLOGY AND THE HUMAN SPIRIT* (1992). As part of a Strategic Environmental Initiative (SEI), Senator Gore proposed tax incentives for new technologies and disincentives for old technologies. *Id.* at 359. Older technologies would include high-Btu fuels such as oil and coal, while newer lower-Btu technologies, such as wind and solar power would be encouraged. *Id.*

4. Clinton, *supra* note 1.

5. Basil Talbott, *Lobbyists Fired Up to Fight Energy Tax*, CHI. SUN-TIMES, Feb. 28, 1993, (Sunday News), at 6.

6. Glenda Holste, *Common Sense Btu Tax Debate Will Benefit All*, HOUS. CHRON., Feb. 24, 1993, at C11.

7. Michael Parrish, *Arco and Unocal Backing Clinton on Btu Tax Plan*, L.A. TIMES, Feb. 27, 1993, at D1.

III. The Energy Tax Takes Shape: A Hybrid Btu Tax

Once the Administration decided to proceed with an energy tax, the question to answer became which one. A carbon tax was rejected due to the sole power of Senator Robert Byrd of coal-rich West Virginia.⁸ His cooperation would be necessary to ensure that the Administration's stimulus bill, as well as spending initiatives, would be adopted. A gasoline tax was rejected because the President specifically denounced it during his campaign as "back-breaking."⁹ The only two taxes remaining were based on fuels. One, the Btu tax, was based on the heat content of fuels, and the other, an ad valorem tax, was based on the sales price of fuels.

The environmental community, led by the Sierra Club and the National Resources Defense Council, successfully argued against the ad valorem tax.¹⁰ The Sierra Club contended that the tax would exacerbate price changes of various energy sources.¹¹ In addition, environmentalists lobbied for two critical components of the energy tax. One was for a structure that favored fuels. The second was for a collection on the tax point of production, such as the *wellhead* for oil and the *utility* for nuclear, so as to engender maximum efficiency gains through the energy production process.

The final product, a Btu tax with an oil supplement, was applauded by the environmental community, as were the composite deficit reduction and stimulus packages. Among the green provisions of the plan were increases in funding for transit and clean water infrastructure, increases in grazing fees, mining royalties, and the elimination of below-cost timber sales.

The hybrid Btu tax was brilliantly conceived in every way. It was simple, clean, easy to administer, and raised sig-

8. *Clinton to Propose Corporate Tax Hikes; Energy Tax Expected, Sources Confirm*, DAILY TAX REP. (BNA) No. 28, at G-7, 8 (Feb. 12, 1993).

9. *White House Considers Energy Tax, Consumption Tax, Officials Confirm*, DAILY TAX REP. (BNA) No. 15, at G-9, 11 (Jan. 26, 1993) [hereinafter *White House*].

10. *WRI, NRDC Call for Energy Taxes, Voice Support for Carbon, Gasoline Levies*, DAILY TAX REP. (BNA) No. 17, at G-7 (Jan. 28, 1993).

11. *Id.*

nificant revenue. It encouraged cleaner forms of energy, and thus would cut pollution without being a carbon tax. It taxed oil at a relatively high rate without being a gasoline tax. Its incidence was regionally balanced, and measures were attached to cushion the impact on low-income people. In addition, the impact on the middle class was relatively modest.¹²

IV. The Btu Tax Enters the World of Politics

President Clinton presented a real and significant deficit reduction package on February 17, 1993 that won plaudits from many. Democratic party members were on top of the world. Meanwhile, the Republicans were faced with a choice between continuing the gridlock in Congress or agreeing with the President, ending the debate.

Optimistic about the plan, environmentalists urged activists around the country to write Members of Congress in support of the President's plan. Three quarters of the House and Senate were visited by teams of environmentalists urging support for the plan. Efforts began to secure a significant pool of funding to publicize the environmental benefits of the package.¹³

The bipartisan support for the plan quickly deteriorated.¹⁴ As details of the spending plan to cut tax ratios became clear, Republicans declared the plan too burdensome, arguing that it relied too heavily on tax increases.¹⁵ Nevertheless, no one thought the package would pass without including the Btu tax, because of its revenue-generating power. Perhaps it was time to wean ourselves away from our reliance on cheap energy.

12. *White House*, *supra* note 9, at G-9.

13. Ruth Marcos and Ann Devroy, *Asking Americans to "Face Facts," Clinton Presents Plan to Raise Taxes, Cut Deficit*, WASH. POST, Feb. 18, 1993, at A1.

14. *House Poised to Act on Clinton Tax Plan; Compromise Seen Possible in Senate*, DAILY TAX REP. (BNA) No. 98, at G-5, 6 (May 24, 1993) [hereinafter *House Poised*].

15. *Business Groups Line Up on Both Sides of Tax Package to Sway House Members*, DAILY TAX REP. (BNA) No. 100, at G-4, 5 (May 26, 1993) [hereinafter *Business Groups*].

While broad political debate was generally in favor of the Btu tax, nearly every industry began to calculate the impact of the proposed tax. Hordes of lobbyists and friends of Capitol Hill informed the Administration that the tax was too onerous and that a few accommodations were necessary to make it more palatable.

By the time the Budget Resolution reached the Senate floor for consideration, key grievances with the Btu tax had been identified.¹⁶ It was clear that the Btu tax had become one of the most contentious issues in the budget package. Nonetheless, champions offered amendments to alter the tax. Some Democratic amendments were designed to give Senators a chance to support the interests of their home states. The Republican amendments, on the other hand, were more restrictive, weakening the Btu tax as a deficit reduction measure. It was clear the Btu tax would take some hits during the legislative process, but it emerged from the first round intact, except for one fatal action concerning ethanol. Senators from the cornbelt had pressured the Treasury Department to agree to exempt ethanol from the tax.¹⁷ The Senate, however, rejected two amendments, one binding and one not, to do that very thing, exempt ethanol.¹⁸ The Administration had made a terrible miscalculation. It had given away something it did not have to concede. The damage was done. It became clear that the Administration would not fight over the details of its plan and could be readily persuaded to alter provisions in order to gain favor with key constituencies.

Less than a week later, Senator Max Baucus of Montana and other Western democrats complained to President Clinton about the inclusion of the public lands provision, such as

16. *House-Senate Reconciliation Conference to Address More Than Just Energy Tax*, DAILY TAX REP. (BNA) No. 123, at G-4, 5 (June 29, 1993) [hereinafter *House-Senate*].

17. Jessica Tuchman Mathews, *Energy Tax Options*, WASH. POST, July 30, 1990, at A11.

18. *Ways and Means Approves Clinton Tax Plan after Making Major Changes*, DAILY TAX REP. (BNA) No. 92, at G-4, 6 (May 14, 1993) [hereinafter *Ways and Means*].

the grazing feed increases in the package.¹⁹ To the disbelief of the Senators, Clinton agreed to strip the grazing provision from the bill. Consequently, House Members who advocated the reform of public land policies were outraged.

A few days later, the Treasury Department issued a revised Btu proposal containing a number of changes that key constituents had sought.²⁰ The exemption of ethanol from the tax was one of these changes.²¹ As a result, home heating oil, which is important to the Northeast, was no longer to be taxed at the supplemental rate, and the point of collection was to be moved downstream.

To make matters worse, the stimulus bill, the first big legislative proposal of the Clinton Administration, was defeated in the Senate.²² Republicans were stunned by the overt partisan strategy of the Administration and stiffened their partisan spines. Thus, the likelihood of a bipartisan support for the deficit reduction program was grim.

The temperament in Washington had quickly changed. What once looked like easy victories for the Clinton Administration were now very uncertain.

V. Industry's Lobbying and Public Relations Machines Rev Their Engines

The opponents of the energy tax smelled blood. There was an avalanche of requests for more accommodations from Capitol Hill and the White House. Hydropower-dependent utilities argued for a lower rate of tax; the aluminum industry maintained the electricity was a feedstock, and therefore, should be exempt; and farmers contended that diesel fuel used on farms should be exempt.²³ In addition, concessions

19. Senator Max Baucus, Address at 103rd Cong., 1st Sess. on *Energy Tax Policy*, 139 Cong. Rec. No. 93, S8207 (daily ed. June 22, 1993) (statement of Sen. Baucus).

20. *Ways and Means*, *supra* note 18, at G-6.

21. *Id.*

22. *Senate Kills Economic Stimulus Plan, Votes Extension of Unemployment Benefits*, DAILY TAX REP. (BNA) No. 76, at G-14 (Apr. 22, 1993).

23. *Debate Rages over Point of Collection for Clinton Energy Tax, Details Unclear*, DAILY TAX REP. (BNA) No. 50, at G-9, 10 (Mar. 17, 1993).

made by the Administration did not preclude anyone from seeking further compromises in the legislative arena.

Previously disparate efforts by the industrial community to seek exemptions from and changes to the Btu tax began to coalesce. In April, the National Association of Manufacturers (NAM) formed the American Energy Alliance (Alliance) to combat the tax.²⁴ At the time, they believed that killing the tax was a long shot. Nonetheless, they distilled a simple, broad message: the Btu tax would increase the cost of producing goods and thus hurt competitiveness. Furthermore, Jerry Jasinowski, chairman of the Alliance and President of NAM, contended that the proposed tax would cost as many as 600,000 jobs.²⁵

The coalition grew and grew, with well in excess of 1,000 members from around the country. The self-described largest coalition of business interests ever to oppose a single legislative proposal focused its efforts on five energy-intensive states (Wyoming, Texas, North Dakota, Louisiana and West Virginia), hoping to build support against the tax. Meanwhile, Citizens for a Sound Economy, with its 250,000 members, staged protest rallies in North Dakota, Oklahoma, Louisiana and Montana, attacking the tax as the worst possible tax we could use to reduce the budget deficit.²⁶

Further opposition arose from the Affordable Energy Alliance and the American Petroleum Institute (API).²⁷ In fact, API pledged to spend nearly five million dollars to defeat the Btu tax. Utilities sent mailers to all their customers blasting the tax. In Michigan and Nebraska, utilities ran full-page ads calling the Btu tax a "job destroyer." Opponents also ran television ads in Louisiana, Oklahoma, Montana and North Dakota.

Some industry groups, however, avoided the shrill, confrontational tactics of API and others, while still adamantly opposing the tax. Notable for its congenial relations with the

24. *Business Groups*, *supra* note 15, at G-5.

25. *Id.*

26. *Id.*

27. *Bentsen Defends Clinton's Tax Proposal; API-Commissioned Study Predicts Job Losses*, *DAILY TAX REP.* (BNA) No. 93, at G-4 (May 17, 1993).

White House, the natural gas industry managed to quietly receive a number of concessions, while continuing to oppose the tax.

Industries that might have stood to benefit from the tax, such as energy efficiency companies, were absent from the debate. Other companies that one would expect might support energy taxes as an alternative to higher corporate taxes, such as Citicorp, opposed the Btu tax because it would hurt many of its clients.

VI. The Btu Enters the Legislative Fray

While appeals for exemption were clogging the hallway outside the cavernous House Ways and Means Committee room, Democrats in the committee showed tremendous courage and discipline. Led by Representative Dan Rostenkowski (D-Ill.), the Democrats unanimously passed the President's budget plan intact, with the Btu tax included.²⁸ As passed, the plan remained relatively unchanged from the Treasury's latest version.

On the House floor, the Democrats narrowly prevailed and passed the plan with the Btu tax as the Ways and Means Committee had crafted it.²⁹ However, the plan was not passed without the Republicans reminding all who were listening of the pain the Btu tax would bring. Each Republican who rose to speak on the House floor declared the specific number of jobs that would be lost in his or her district due to the Btu tax. Then, the Republicans would proceed to inform Democrats who had previously spoken how many jobs would be lost in their respective democratic districts.

Next, the action turned to the Senate Finance Committee, led by Senator Daniel Patrick Moynihan (D-N.Y.).³⁰ The Republicans on the committee were solidly against the plan.

28. *Ways and Means Approves Clinton Tax Plan with Changes*, DAILY TAX REP. (BNA) No. 92, at G-4 (May 14, 1993).

29. *House Adopts Budget Reconciliation Bill by Narrow Margin of 219-213*, DAILY TAX REP. (BNA) No. 102, at G-4 (May 27, 1993). See also *Clinton Praises Approval of Budget Bill*, LEGAL INTELLIGENCER, at 5 (June 28, 1993).

30. *Clinton Plan Faces New Challenge in Senate*, DAILY TAX REP. (BNA) No. 103, at G-4 (May 28, 1993).

For them, the overall package had too many tax increases. Thus, with only a narrow eleven to nine Democratic majority, each Democrat on the Finance Committee held power to block the President's plan.

The Democrat that seized the power was Senator David Boren of Oklahoma. His primary target was the Btu tax and he wanted it out.³¹ Boren also asserted that the package should be crafted with bipartisan support and should contain more spending cuts and fewer taxes.

Senator Boren teamed up with fellow Committee member Senator Jack Danforth (R-Mo.) to craft an alternative plan.³² Their plan eliminated the energy tax and made up for the lost revenues by cutting a number of programs for the poor. Boren's alternative was denounced, but he refused to budge in his opposition to the President's plan. The Committee had no choice but to strike the energy tax. They did so and replaced it with a 4.3 cent per gallon gasoline tax.³³

Advocates for the Btu tax had hoped that the conference agreement between the House and the Senate would include some form of a broad-based energy tax, but the politics had become too poisoned. Even thoughtful and progressive members such as Representative David Obey (D-Wis.) called for elimination of the Btu tax. This was not because they did not like energy taxes, but because the Btu tax was the only middle class tax in the President's plan, and Clinton had campaigned on a middle class tax cut. Other House Democrats who had voted for the House bill with the Btu tax, such as Representative Charles Stenholm (D-Tex.), declared that they would not vote for the final bill if it still contained the Btu tax.³⁴ In fact, Representative Stenholm admitted, "I voted for the Btu tax because I knew it would never become

31. *Boren Still Urging More Spending Cuts, Btu Tax Changes in Deficit Reduction Plan*, DAILY TAX REP. (BNA) No. 108, at G-6 (June 8, 1993).

32. *Senators Boren, Danforth Would Kill Btu Tax in Alternative Deficit Reduction Plan*, DAILY TAX REP. (BNA) No. 97, at G-10 (May 21, 1993).

33. *House-Senate*, *supra* note 16, at G-4.

34. *House-Senate Conference Disputes Likely Over Transportations Tax, Brewster Says*, DAILY TAX REP. (BNA) No. 115, at G-13 (June 17, 1993).

law.”³⁵ Plagued with such dissolution of support, the President did not have a vote to spare in either body.

VII. Environmental Disenchantment

With the defeat of the stimulus bill and the removal of public lands tax increases from the budget package, enthusiasm for the President’s plan waned considerably among environmentalists. Even though the Btu tax remained in the plan, large grassroots organizations in the environmental community decided that the Btu tax had been revised beyond recognition, and that activists would not be excited about fighting for it.

That decision essentially left the battle for the Btu tax to the environmentalists inside the Washington beltway. Faced with a nationwide barrage of orchestrated efforts by industries, it was only a matter of time before opposition to the tax would overwhelm it.

The environmental community made a valiant attempt to salvage the tax with its repeated proposals to address key complaints such as international competitiveness, but these “technical fixes” were lost in the noise. Throughout the process, various environmental groups produced information which refuted industry claims, but these groups lacked the resources to effectively communicate their findings. For example, the Institute for Local Self-Reliance easily demonstrated how industry, farmers and homeowners could beat the tax with low-cost efficiency investments.³⁶ Also, the American Council for an Energy Efficient Economy demonstrated that the tax would create at least 40,000 jobs nationwide.³⁷ However, hard analyses that undermined industry’s predictions of dire consequences were rarely reported. For

35. *Id.*

36. Brad Knickerbocker, *The Recycling Payoff in the Energy Tax Plan*, CHRISTIAN SCI. MONITOR, June 7, 1993, at 13. Studies by the Institute for Local Self Reliance, a non-profit research and educational organization, show that farmers, manufacturers and homeowners can reduce their energy consumption by six percent. *Id.*

37. *Two Studies Link Jobs and Energy Taxes — and Come to Opposite Conclusions*, 3 ENERGY ECON. CLIMATE CHANGE, No. 5, 1 (May 1993).

example, despite knowledge that energy is only a relatively modest factor of production, industrial groups successfully claimed that manufacturing would be devastated by the imposition of the Btu tax.³⁸ Thus, without adequate political capital, attempts by environmentalists to salvage the Btu tax were in vain.

Although last-ditch efforts were made to retain some semblance of a broad-based energy tax, like a utility tax coupled with a transportation tax, for all intents and purposes, the energy tax was dead.³⁹

VIII. Conclusion: Death and Taxes

In the end, if the Btu tax had not been killed, it would have sunk under its own weight. For President Clinton, the Btu tax had become a lightning rod of general discontent. It had been poked full of holes by the many committees and worn thin to the bone by legislators who handled it. The tax that had once been based on sound economics and ecology was now based on political favoritism.

As exemptions grew, the twin justifications for the tax, deficit reduction and environmental protection, crumbled. The concessions both disrupted the regional balance of the tax and lost significant revenue. As the concessions increased, the tax's appeal to deficit hawks and environmentally-minded legislators evaporated. Furthermore, tax experts on Capitol Hill and elsewhere now believed that the tax had become untenable.

Many different parties contributed to the demise of the Btu tax. Industry, armed with enormous resources, masterfully targeted vulnerable members of Congress to ensure their opposition to the tax. In fact, the very industry groups

38. See Bill Mintz, *Clinton Agrees to Compromise; Senate Resistance Kills Btu Tax*, Hous. CHRON., June 9, 1993, at A1 (claiming that the main objection of the industries is that if taxed, their goods would have to compete in international markets against goods not subject to this tax).

39. *Presidents Plan Will Require Energy Tax, Panetta Says; Conferees Leave Issue Open*, DAILY TAX REP. (BNA) No. 138, at G-7 (July 21, 1993). See also, *Environmental Impact of Gasoline Tax Characterized as Minimal to Negligible*, DAILY TAX REP. (BNA) No. 153, at G-6, 7 (Aug. 11, 1993).

that worked the hardest to relieve the burden of the tax on industry, by pushing it onto consumers, suddenly pivoted politically, declaring the tax unreasonably burdensome on consumers since industry would escape from the tax unscathed. The environmental community also contributed to the bill's demise as environmentalists, disillusioned with the evolving bill, lacked the strong support required for the bill to pass. These dynamics of discontent created an atmosphere in which members of Congress who were opponents of the tax actively fought it while members of Congress who favored the tax became silent, passive supporters. The Clinton Administration proved to have neither a commitment to nor a clear strategy regarding the energy tax. In fact, the strategy appeared to be an avoidance of the topic. By and large, most attacks on the bill went unanswered by the Administration.

Perhaps most importantly, the President failed to persuade the public as he had persuaded some economists and editorial writers. He was unable to invoke public understanding that energy taxes are more beneficial to the country than other taxes, like consumption taxes, because they discourage pollution. The message of what the country stood to gain from the enactment of the Btu tax never, in this legislative travesty, reached the ears, or minds, of the people.

In the end, elite Washington advocates of the broad-based energy tax as well as environmental groups who supported the Btu tax mustered neither the political capital nor the public persuasion necessary to see the Btu tax to fruition.