GREAT PLAINS FEDERAL TAX INSTITUTE: 50TH ANNIVERSARY DINNER IN OMAHA, NEBRASKA ON NOVEMBER 29, 2012

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On this fiftieth anniversary of the Great Plains Federal Tax Institute, I would like to discuss some important changes that have occurred in our federal tax system during my career, which is approaching its fiftieth year. We presently are at a crucial point in our country's fiscal and tax reform efforts. I believe that looking to the past may provide a useful perspective as we look toward the future.

† Lawrence B. Gibbs graduated from Yale University, magna cum laude, with a Bachelor of Arts degree in 1960 and from the University of Texas School of Law (with honors) where he received a LLB degree in 1963. He was admitted to the Bar of the State of Texas and began to practice law in Corpus Christi, Texas in June 1963. He also is a member of the Bar of the District of Columbia.

Larry came to Washington, D.C. in November 1972 when the then Secretary of the Treasury, George Shultz, appointed him to become the Deputy Chief Counsel of the IRS. He also served as Acting Chief Counsel in 1973 until the then IRS Commissioner, Don Alexander, appointed him to serve as the Assistant Commissioner (Technical) of the IRS.

Larry left the IRS in January 1976 to become a member of a Dallas, Texas law firm. Ten years later in August 1986, Larry returned to Washington, D.C. when then President Ronald Reagan appointed him and the Senate confirmed him to become the Commissioner of the IRS.

In 1989, Larry returned to private law practice as a member of the Washington, D.C. office of his prior Dallas law firm, and since 1994 Larry has been a member of the law firm of Miller & Chevalier, where he remains today.

Larry is an Advisory Trustee of the Southern Federal Tax Institute. He is a member of the American Law Institute, the American College of Tax Counsel, the American College of Trust & Estate Counsel, the Board of Directors of Tax Analysts, and the Taxation Section of the American Bar Association, where he serves on the Committees of Administrative Practice, Formulation of Tax Policy, and Tax Court Appointments. He is also member of the Audit Advisory Committee of the General Accountability Office.

In 1989, Larry received the Treasury’s Alexander Hamilton Award. He also has received the Distinguished Service Award from the Tax Executives Institute and the Kenneth S. Liles Award for Distinguished Service from the Federal Bar Association. Two years ago the Tax Section of the Texas State Bar recognized Larry with its Tax Legend Award. In 2013, Larry was presented the Pillar of Excellence Award by the Tax Council Policy Institute. Five years ago the American College of Tax Counsel asked Larry to deliver its prestigious Griswold Lecture. Larry has written and spoken about tax and tax related subjects over the past fifty years that he has been practicing federal tax law in the private and public sectors.

Larry is married to Dorothea Straughan Gibbs, and they have two children and five grandchildren, all of whom live in the Washington, D.C. area.
Because of the number of tax changes during the last fifty years, I will focus on what I consider to be among the most important tax changes. I do not intend to criticize or to evaluate any of these changes. I simply will describe the changes and leave it to others to assess their benefit or detriment to our tax system.

The biggest changes seem to me to have occurred in tax law itself—the way tax law is conceptualized, the way it is enacted, the way it is administered, and the way it is practiced.

When I began in 1963, the practice of tax was very much about federal tax law, whose primary purpose was simply to raise revenue to help fund the annual costs of operating our federal government, largely by taxing the incomes of individuals and businesses, and to a large extent by following certain principles of taxation.

These federal tax law principles often originated in the textbooks used to teach tax in law schools and business schools across the country in order to answer questions like: What is income? Whose income is it? When should the income be taxed? What are the expenses to produce income that should be deductible, and when and how should such expenses be deducted?

In 1963, these general income tax principles underlay the structure and content of the Internal Revenue Code (the “Code”). It, therefore, seemed perfectly natural to me that in 1963 preeminent tax scholars like Stanley Surrey from the Harvard Law School tax faculty was the then Assistant Secretary of the Treasury for Tax Policy and Mortimer Caplin from the University of Virginia Law School tax faculty was the then Internal Revenue Service (“IRS”) Commissioner.

The point is that fifty years ago, for the most part, tax lawyers conceptualized, wrote, and administered our federal tax laws. They did so in accordance with certain principles and policies. Tax law was interpreted by lawyers who were judges and generally was practiced by lawyers who had been, and continued to be, students of these tax principles and policies for their entire careers, serving as tax generalists in the federal tax area. The prestigious American Law Institute (“ALI”), with its considerable number of tax lawyer-members, pursued many projects to analyze, refine, restate, and improve upon the legal principles underlying various portions of our federal income, gift, and estate tax laws.

In 1972, when I first went to Washington, D.C., tax lawyers still held the key appointive positions at the Treasury Department and the IRS. The Congress was dominated in the tax area by the chairmen of the two Congressional tax writing committees. Both were lawyers. Wilbur Mills was the then Chairman of the House Committee on Ways and Means, and Russell Long was the then Chairman of the
Senate Committee on Finance. The two of them, along with Larry Woodworth, then Chief of the Staff of the Joint Committee on Taxation, kept very tight reins on the content and passage of federal tax legislation. The Joint Committee at that time was the only congressional staff that drafted tax legislation.

For the better part of my career there was a predictable, almost seasonal, ebb and flow to tax legislation. Most major tax bills proceeded through each year in an organized, deliberate manner from the President's initial tax proposals through House hearings, mark-up, and vote followed by Senate hearings, mark-up, and vote followed by a House-Senate conference to resolve any differences between the House and Senate bills. The final tax bill was passed by both houses of Congress and signed by the President. Care was taken during this legislative process to ensure that proposed tax law changes were fully vetted as good tax policy before they were enacted; a process that involved a good deal of give-and-take between the regulators and the regulated and between Democrats and Republicans.

By the mid-1970s, however, this process began to change. After Wilbur Mills retired as Chairman of the House Committee on Ways and Means, congressional tax staffs began to proliferate. Additional tax staffers were added to the House and Senate tax writing committees, and more tax staffers were hired later by the individual members of the House and Senate tax writing committees. These new tax staffers participated in the tax legislative process in addition to the staff of the Joint Committee.

As a result, tax legislation in the mid-1970s began to grow in volume and complexity. The 1976 Tax Reform Act\(^1\) was a very large tax act. The Revenue Act of 1978\(^2\) was almost as large, and it was followed by three tax acts in 1981,\(^3\) 1982,\(^4\) and 1984,\(^5\) which were even larger tax acts. Because of this increased volume and complexity of annual tax legislation, the tax law increasingly became less organized around overall guiding tax principles and more and more fixated on detailed rules applicable to specific areas of the tax law.

This, in turn, led to increased tax specialization in the private sector. Law firms increased the number of their tax lawyers and opened Washington, D.C. offices with even more tax lawyers. By the mid-1970s, accounting firms were providing tax planning and controversy services that were more than competitive with law firms, and today

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they offer an increasing number of tax services not found in many law firms. In fact, over the last forty years the federal tax industry in the private sector has exploded with the addition of an incredible number of tax consultants, tax experts, tax lobbyists, tax media, and others—all providing input into and having an impact upon the legislative and administrative processes of taxation.

Today the legislative process is quite different from what it was forty years ago. The present Chief of Staff of the Joint Committee on Taxation, Tom Barthold, has observed that the seasonal ebb and flow of tax legislation, which I just described, has been replaced by more thematic tax legislation projects. These projects are all proceeding at the same time in the House and in the Senate throughout the year at a much faster pace, a sometimes frenetic process in which legislative mark-ups outnumber congressional hearings. It is worth noting that the ALI has not had a tax project in the last fourteen years. Perhaps this is because the ALI sees tax law as an ever changing collection of tax rules without a coherent set of guiding tax principles that does not lend itself to the type of tax projects the ALI undertook during the first thirty-five years of my career.

Statutory and effective tax rates also have changed significantly in the last fifty years. In 1963 when I began, the top statutory tax rate for individuals was ninety percent, but numerous tax benefits in the Code provided a myriad of tax planning opportunities, such that effective tax rates were much lower—often well below fifty percent for most of our individual and business clients. Individual and business income tax planning was very much in vogue throughout the 1960s, 70s, and early 80s. The same was true in the estate and gift tax areas. Tax advisors really could help clients legitimately lower their income and transfer tax costs by basic, rudimentary income tax and estate tax planning techniques.

The 1986 Tax Reform Act⁶ significantly reduced the high statutory tax rates. To replace the revenue lost when the tax rates were reduced, tax benefits largely in the form of deductions and credits were curtailed or eliminated in 1986, thereby broadening the tax base against which the reduced rates were applied. In other words, individual and business taxpayers gave up tax benefits in the form of tax deductions and tax credits as the price to be paid for reduced tax rates. The result today, however, is that in order to further reduce statutory rates by more base-broadening, the few remaining and significant tax benefits that might be eliminated to pay for rate reduction—like home mortgage interest, employer provided healthcare, and charitable de-

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ductions—are used by so many taxpayers that individual tax reform today is likely to be much more difficult than it was in 1986.

Another change in the tax law has been the extent of tax compliance and non-compliance over the last fifty years. During the first twenty years of my practice, individual income tax planning gradually became more aggressive because only a handful of aggressive tax practitioners started a trend. These practitioners’ planning methods led to an increased incidence of non-compliance. The IRS and the courts largely were able to contain any significant damage to the tax system, often through the application of judicially created tax doctrines like step transaction, substance over form, and economic substance. The application of these intentionally very uncertain doctrines was used by the IRS and the courts to overturn tax planning results that were seen as too good to be true.

When I was growing up as a tax lawyer, it was generally accepted that the function of these tax doctrines was to police overly aggressive tax planning by taxpayers and their advisors if they read the law too literally or used tax provisions for purposes not intended. No one suggested there should be a rule to deal with each improper use of the tax laws. Nor did many suggest that the tax doctrines could, or should, be fully rationalized. The doctrines were recognized to be blunt instruments the IRS and the courts used to deal with overly aggressive tax planning. For that reason, most tax lawyers I knew around the country during my formative years did not want to risk damaging their reputations by assisting clients who wanted to reduce their taxes using techniques that ventured into gray areas of the tax law to which the doctrines might apply.

Eventually, however, more and more tax advisors began to use aggressive tax planning transactions for individuals that came to be called “tax shelters” in the 1970s. To meet this challenge, in the mid-1970s and continuing into the 1980s, Congress passed significant tax legislation almost every year that added increasingly more punitive tax penalties and other tax sanctions to economically deter tax shelter planning. Each new tax abuse was met by a new tax sanction provision. A constantly changing, ever increasing number of anti-tax avoidance rules replaced the principles of the tax doctrines to deal with ever more aggressive tax behavior of taxpayers and their advisors.

As aggressive as the tax planning was in the 1970s and 1980s, however, nothing in those years compared with the aggressiveness of the tax shelters of the 1990s and early 2000s. What began as a corporate tax shelter problem quickly spread to all types of taxpayers and involved transactions that eventually spread into all areas of the tax
law. The tax laws were seen by increasing numbers of tax practitioners as rules that could be avoided by many and even evaded by some. The aggressiveness of taxpayers was often matched and facilitated by that of their advisors. Looking back at the over-the-top tax shelters of the 1990s and early 2000s, the extent of tax non-compliance was unlike anything I have seen during my career, with the possible exception of the number and audacity of recent offshore and foreign bank account tax fraud schemes.

By the mid-1980s, as a result of ten years of this hyper-lexis, the size of the Code had grown at an alarming rate. In the early 1980s, calls for major tax reform had begun, calls that eventually led to the passage of the Tax Reform Act of 1986. These tax reform efforts were grounded in aspirations for a simpler, fairer, and more economically efficient tax law. The problem, of course, is that the 1986 Act did not last. Almost constant tax legislative changes over the last twenty-six years have undone many of the principles and provisions of the 1986 Act.

When I returned to the IRS as Commissioner in 1986, the biggest change in the ten years that I had been away was in the international tax area. For the first twenty-five years of my practice, most of my firms' clients were doing business in the United States. But by the mid-1980s that began to change. Over the last twenty-five years, the fastest growing federal tax area has been in the international tax arena because of the increasingly global activities of U.S. businesses and individuals. It is clear that for the foreseeable future the IRS and the courts will be allocating more and more of their resources, time, and attention to the international tax area, which means that tax practitioners will be doing the same.

Over the last twenty-five years, another significant change has occurred. Economists have assumed a greater role in the tax legislative process, as have the social, economic, and fiscal objectives of the politicians. Today it is clear that tax lawyers do not control tax policy or tax administration. The Assistant Secretary for Tax Policy at the Treasury Department, Mark Mazur, is an economist, and to a very large extent economists in the White House determine what each administration's tax policy will be. And for the last fourteen years the three IRS commissioners have been businessmen rather than tax lawyers, a trend that I believe is likely to continue for the foreseeable future.

The economists and the politicians have had very different mindsets, goals, and approaches than those of the tax lawyers who preceded them. The economists and the politicians have been less concerned that the tax system operate in accordance with certain tax principles and more interested in developing rules that will cause the tax system to operate as efficiently as possible to achieve their economic and political objectives.

For example, it appears to make more sense to the economists and politicians for the tax system to administer the funding of our federal welfare system than to have the IRS collect taxes and have Health and Human Services ("HHS") use a portion of the taxes collected to administer the welfare system. The IRS largely does this through the use of the earned income tax credit, which is a refundable credit. In other words, the IRS—and not HHS—makes direct payments to welfare recipients and enforces compliance with the welfare laws. This approach has introduced significant ongoing risks of fraud into the tax system, and has been rationalized by the economists and politicians on the basis that there would have been fraud even if HHS had continued to administer the welfare system.

Today, however, one of the fastest growing programs at the IRS is to assist taxpayers whose identities have been stolen. Crooks around the country are leaving the drug trade to steal taxpayer identities to file fraudulent tax returns claiming refunds based on refundable tax credits. The bad guys candidly admit doing so because, they say, stealing identities and preparing fraudulent returns is easier and less hazardous than dealing drugs, the pay is better, there is less risk of being caught, and if they are caught, their jail time is shorter. Besides, they say, they haven't killed or injured anyone or stolen anyone's property—failing, of course, to realize that, by defrauding our tax system, they effectively have stolen everyone's money.

No one knows how big this refund fraud problem really is or may become. Clearly it is in the multi-billions of dollars each year, and it is large enough for Congress to have held hearings earlier this year to call to task the IRS for failing to halt the growth of the fraud. To my knowledge, no economist or politician has ever asked or attempted to determine whether the loss of revenue and other risks involved in running our welfare system through our tax system are greater than those of operating the welfare system independently from our tax system.

Similar efficiency arguments have been used by economists and politicians to justify the IRS administering the funding of the government healthcare and retirement entitlement programs, Medicare and Social Security, as well as education, energy, housing, economic stimulus, and other socio-economic programs that in the last twenty-five years have become part of our tax law. All of these programs are government spending programs that are being run through our tax system. The IRS often has neither the expertise nor the resources to effectively administer these programs.

The use of our tax system to encourage and administer these kinds of government spending programs has become so extensive that the focus of our tax laws and tax system appears to no longer be primarily on revenue raising. Instead, the IRS today appears to be viewed by many as a financial clearinghouse for a growing number of governmental programs.

The use of our tax system to accomplish social, economic, and fiscal objectives of our politicians and to replace direct spending programs has grown so large that today our tax law and tax system are at the center of the contentious fiscal disagreement between our two political parties. One party wishes to raise taxes and the other wishes to reduce spending, but both parties only prolong a year-by-year extension of a significant portion of our present tax law. This political disagreement is also at the heart of the so-called “fiscal cliff” crisis, about which we have heard so much.

Over the last fifty years, although the two political parties periodically had their differences, in the federal tax area, the politicians were able to find ways to resolve those differences. During that time, the politicians and the voters took to heart a Civics 101 lesson that our government of checks and balances made it relatively easy to prevent things from happening in Congress, which made it necessary for our two political parties to find ways to compromise to get anything done. Since at least the early 1990s, however, partisan politics have made compromise increasingly difficult; to the point that today our tax legislative process has become a part of the present political gridlock that threatens our country’s fiscal well-being.

Without leadership in both political parties at both ends of Pennsylvania Avenue and a willingness to make real and meaningful compromises to raise revenue and to reduce spending, the present political gridlock is likely to continue until there is some sort of fiscal calamity that will make the 2008 recession seem tame by comparison. As we all have learned over the last twenty-six years since passage of the
Tax Reform Act of 1986,\textsuperscript{10} meaningful and long-lasting tax reform is likely to be possible only when the citizenry and the politicians whom they elect find ways to agree upon and limit the appropriate levels of both spending and taxation by our federal government. There are hopeful signs for fiscal and tax reform, but only time will tell if we have the will and capability as a nation to do what most of us appear to recognize we need to do but are having a very hard time figuring out a way to do it.

A good friend of mine used to say that a speaker should stand up to be seen, speak up to be heard, and sit down to be appreciated. So let me conclude.

Throughout my career, annual tax conferences like your Great Plains Federal Tax Institute helped me and many other tax practitioners keep up with all of the tax changes and developments that were occurring each year. When I began to practice almost fifty years ago, tax law seemed to me to make a lot of sense. Today there appears to be a growing perception that our tax law is a mess that makes little or no sense. I suspect my initial perception of the tax law was—and today's perception of the tax law is—overly exaggerated. The one thing that has not changed for me over the last fifty years is that tax law and tax practice, whether in the private or the public sectors, have been enormously interesting, challenging, and rewarding. The opportunity to look back at the changes of the last fifty years and to share my thoughts about them have been equally enjoyable, especially in the context of your fiftieth anniversary celebration.

Thank you for giving me this opportunity.

\textsuperscript{10} Pub. L. No. 99-514, 100 Stat. 2085.